United States Court of Appeals

for the Second Circuit

APPENDIX

Docket No. 73-1911

(80-E)

74-1911

B

P/S

IN THE
United States Court of Appeals
For the Second Circuit

ROYAL STEUBING
231 East Virginia Blvd.
Jamestown, New York
CHAUTAUQUA COUNTY ENVIRONMENTAL DEFENSE COUNCIL
JOSEPH CATANIA
Drive-In Motel
Westfield, New York
ROBERT SEINDELL
19 Chestnut Street
Jamestown, New York
JAMESTOWN AUDUBON SOCIETY
MARTIN OQUIST
Greenhurst, New York
JACK LLOYD
Greenhurst, New York
RICHARD MUDGE
49 Peleison Street
Jamestown, New York
TROUT UNLIMITED
ALAN REPPENHAGEN
Silvercreek, New York
CHAUTAUQUA COUNTY FEDERATION OF SPORTSMEN
CHARLES MOHNEY
Bemus Point, New York
CHAUTAUQUA LAKE POWER BOAT CLUB,

Plaintiffs-Respondents,

—against—

CLAUDE S. BRINEGAR, SECRETARY OF DEPARTMENT OF TRANSPORTATION
400 7th Street S.W.
Washington, D.C. 20590
RAYMOND T. SCHULER, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF TRANSPORTATION
Albany, New York,

Appellants.

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FILED
AUG 22 1974
DANIEL FUSARO, CLERK
SECOND CIRCUIT

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROYAL STEUBING, ET AL.,

Plaintiffs

-vs-

CLAUDE S. BRINEGAR, Secretary of Department of Transportation, ET AL.,

Defendants

CIVIL 1973-576

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ORDER TO SHOW CAUSE.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROYAL STEUBING
231 E. Virginia Boulevard
Jamestown, New York
CHAUTAUQUA COUNTY ENVIRONMENTAL DEFENSE COUNCIL
JOSEPH CATANIA
Drive-In Motel
Westfield, New York
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Silvercreek, New York
CHAUTAUQUA COUNTY FEDERATION OF SPORTSMEN
CHARLES MOHNEY
Bemus Point, New York
CHAUTAUQUA LAKE POWER BOAT CLUB,

Plaintiffs

-vs-

CLAUDE S. BRENEGAR, SECRETARY OF DEPARTMENT OF TRANSPORTATION
400 7th Street S.W.
Washington, D.C. 20590
RAYMOND T. SCHULER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF TRANSPORTATION
Albany, New York,

Defendants

Order to Show Cause.

TO:

The Attorney General of the State of New York;
The United States Attorney for the Western
District of New York

YOU ARE HEREBY ORDERED TO SHOW CAUSE at 10:00 o'clock in the forenoon on Monday, December 3, 1973 at the United States Courthouse, Buffalo, New York, why an order should not be entered:

1. Granting the declaratory and injunctive relief prayed for herein, and

2. Granting attorneys and expert witness fees prayed for herein.

s/ JOHN T. CURTIN
United States District Judge

Buffalo, New York
November 23, 1973

SUPPORTING AFFIDAVIT OF RICHARD J. LIPPES.

(SAME TITLE).

STATE OF NEW YORK)
COUNTY OF ERIE): SS.
CITY OF BUFFALO)

I, RICHARD J. LIPPES, being duly sworn, deposes and says on information and belief:

1. That I am an attorney licensed to practice law in the State of New York and the United States District Court for the Western District of New York, and I represent the plaintiffs in the action herein.

2. That the within action has been brought for an order to show cause why the United States Secretary of Transportation and the Commissioner of the Department of Transportation for the State of New York should not be enjoined from building a bridge over Lake Chautauqua in Chautauqua County, State of New York.

3. That the prayed for relief is sought based upon the belief of deponent that various laws of the United States have not been complied with as more fully set out in the complaint attached hereto and made a part hereof.

4. That to the belief of your deponent, and after investigation of the facts of the within action, there is a substantial likelihood that plaintiffs will prevail on the merits of this lawsuit due to various violations of law as previously mentioned.

5. That moreover, plaintiffs will be irreparably injured by denial of the prayed for relief in that:

a) Continuing federal-aid bridge construction work is certain to degrade conservational, recreational and aesthetic values which plaintiffs enjoy; and

b) Continuing to exempt federal-aid bridge construction work from the various laws and requirements cited in plaintiffs' complaint will foreclose consideration of less environmentally destructive alternative; and

c) Defendants failure to comply with the aforementioned laws and requirements deprive plaintiffs' of their rights to avoid or mitigate degradation of environmental values through informed federal highway administration decision making.

6. The public interest served by the prayed for relief outweighs any hardship which the defendants might claim in that plaintiffs do not seek either an order or a judgment which would permanently enjoin or prevent proposed construction but merely seeks full compliance with laws which congress passed in order to preserve and enhance our Nation's environment.

WHEREFORE, your deponent requests that the relief prayed for herein, to wit: that an order to show cause should issue to show the bridge over Lake Chautauqua should not be temporarily enjoined until full compliance with law and that attorney and expert witness fees and costs be granted.

Respectfully submitted,

s/ RICHARD J. LIPPES
RICHARD J. LIPPES
Attorney for Plaintiffs
Office and P. O. Address
800 Western Building
Buffalo, New York 14202

(Sworn to November 24, 1973).

COMPLAINT.

(SAME TITLE).

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Applicable Statutes, jurisdiction and Description of the parties

1. This is a civil suit seeking equitable relief to prevent the defendants and their agents and those acting in concert with them from proceeding with activities intended to culminate in construction of a highway bridge spanning Lake Chautagua in New York State, known as Section 5C Southern Tier Expressway Stow-Bemus Point Chautagua County (hereinafter referred to as Lake Chautagua Bridge.)

2. This suit arises under

a. The Fifth, Ninth and Fourteenth amendments of the Constitution of the United States.

b. The Federal Aid Highway Act, as amended 23 U.S.C. Sec. 101 et seq. (hereinafter referred to as "FHWA").

c. The National Environmental Policy Act, 42 U.S.C. Sec. 4321 et seq. (hereinafter "NEPA").

d. The Clean Air Amendments of 1970, P.L. 91-604, 84, Stat. 1676.

e. The Department of Transportation Act, as amended, 49, U.S.C. Sec. 1651 et seq.

3. This Court has jurisdiction of this action under 28 U.S.C. Secs. 1331 (Federal Question) 1337 (Commerce Regulation) 1343 (Civil Rights), 2201-2202 (Declaratory Judgments), and 5 U.S.C. Secs. 701-706 (Administrative Procedure Act).

4. Venue lies in the Western District of New York under 28 U.S.C. Sec. 1391.

Complaint.

5. The amount in controversy, exclusive of interest and costs, exceeds ten thousand dollars.

6. The individual plaintiffs Royal Steubing, Robert Seindell, Martin Oquist, Jack Lloyd, Richard Mudge, Alan Reppenhagen, and Charles Mohney have standing to bring this action because they reside in the area directly and seriously affected by the construction of the Lake Chautagua Bridge in that the construction of said bridge will result in a deprivation and loss of environmental values they now enjoy including but not limited to recreational activities associated with Lake Chautagua, asethetic benefits, their right to a clean and unpolluted environment and other damages as stated herein.

7. The plaintiff Joseph Catania has standing to bring this action because he is the proprietor of the Drive-In Motel and restaurant which is located in the vicinity of said Lake Chautagua Bridge and his ability to support himself and his family will be impaired by the adverse effect said Lake Chautagua Bridge will have on said motel and restaurant business.

8. The plaintiffs, Chautagua County Environmental Defense Council; Jamestown Audubon Society, Trout Unlimited, Chautagua County Federation of Sportsmen and Chautagua Lake Power Boat Club are all non-profit organizations who have a long history of environmental interests and each of whom has members who will be adversely affected by the construction of the Chautagua Lake Bridge. Furthermore, each of the above named groups has great expertise in its own area and each has been active in opposition to the Lake Chautagua Bridge over a substantial period of time.

9. The defendant Claude S. Brenegar, is the Secretary of Transportation of the United States. In that capacity he is responsible, inter alia, for administering the Department of Transportation of the United

States (hereinafter "USDOT"), and specifically for administering the Federal-Aid Highway Act, as amended, under which federal funds are dispensed to the several states, subject to requirements of law, for the construction of highways.

10. Defendant Raymond T. Schuler is the Commissioner of Transportation of New York State. In that capacity he is responsible, inter alia, for administering the Department of Transportation of the State of New York (hereinafter NYDOT) and specifically for administering the federally aided highway construction program of the State of New York.

11. The authority of defendants above named with respect to highway construction is limited by the constitutional and statutory provisions cited above. In taking the actions complained of herein, defendants have acted, and are acting in excess and contrary to their constitutional and statutory authority.

12. The defendants, and their respective predecessors in office have been responsible for the illegal actions, including failure to perform duties owed to plaintiffs complained of herein. Relief is sought against these defendants in their official capacities to enjoin them from further illegal actions and compel them to fulfill their legal duties to plaintiff.

GENERAL ALLEGATIONS

13. The Lake Chautagua Bridge, involved herein designated as Section 5C of the Southern Tier Expressway is a segment of a highway project planned from Binghamton to the New York State line in Chautagua County, and then connecting an expressway in Pennsylvania in the vicinity of Findley Lake in Erie, Pennsylvania which would connect with Interstate 90.

Said Southern Tier Expressway has been approved as an Appalachian Development Corridor Highway in

accordance with the Appalachian Regional Development Act of 1965. The above described Corridor was adopted on May 10, 1965. Therefore, the highway will be funded partly by Federal funds and partly by New York State funds.

The highway itself is planned as a controlled access modern expressway type facility, divided with two (2) lanes in each direction with 10 or 12 foot shoulders on the right and 6 foot shoulders on the left in the direction of travel, with a designed speed of 70 miles per hour.

It is planned that the Bridge itself would commence at the easterly limit of Sec. 5B of said Southern Tier Expressway on the west bank of Lake Chautagua in the Town of North Harmony. A four lane structure that transverses the lake and at the east bank Two (2) Two (2) lane structures will carry the expressway over relocated Main Street and relocated Bemus Creek. Sec. 5C then ends at the westerly limit of Sec. 5D of the Southern Tier Expressway. The total length of Sec. 5C is 2.525 miles which includes 1.635 miles of structure over Lake Chautagua, and 0.186 miles over relocated Main Street and relocated Bemus Creek. It is estimated that the total cost of Sec. 5C, Bemus Point to Stedman, will be approximately Twenty Two point Eight (22.8) million dollars. Under the projected Southern Tier Expressway route, 17.72 miles of new expressway would be constructed.

CAUSES OF ACTION

14. In taking and permitting steps toward construction of the Lake Chautagua Bridge, defendant Brenegar has violated, is violating, and unless restrained by this Court, will continue to violate the policy and command of Secs. 101(a) and (b) and 102 (1) of NEPA that all Federal agencies:

> "use all practicable means and measures, including financial . . . assistance, in a manner calculated to foster and promote

> the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans",

and that all federal agencies:

> "use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal Plans, functions, programs, and resources to the end that the Nation may --
>
> "(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> "(2) assure for all Americans, safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
>
> "(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable or unintended consequences;
>
> "(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
>
> "(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
>
> "(6) enhance the quality of renewable resources ...."

and that "to the fullest extent possible . . . the policies,

regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act . . ."

15. In taking and permitting steps toward construction of the Lake Chautagua Bridge, defendant Brenegar has violated, is violating, and unless restrained by this Court, will continue to violate the command of Section 102 (2) (A) of NEPA that "all agencies of the Federal Government shall . . . . utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment."

16. In permitting NYDOT to proceed with plans for the construction of the Lake Chautagua Bridge on the basis of a cost-benefit analysis which explicitly excluded from consideration "any economic value that the community would place on comfort and convenience," including environmental amenities, defendant Brenegar has violated, is violating, and unless restrained by this Court, will continue to violate Section 102 (2) (B) of NEPA which requires "all agencies of the Federal Government" to

> "identify and develop methods and procedures . . . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making . . . ." (Emphasis added)

17. In taking and permitting steps toward construction of the Lake Chautagua Bridge, defendant Brenegar has violated, is violating, and unless restricted by this Court, will continue to violate the command of Section 102 (2) (C) of NEPA that a "detailed statement by the responsible official on --

"(1) the environmental impact of the proposed action;

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;

"(iii) alternatives to the proposed action;

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long term productivity; and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented,"

be prepared, and that said detailed statement be "made available to the . . . public and shall accompany the proposal through the existing agency review process." On information and belief, no environmental impact statement has been prepared which is a clear violation of the above statute. Furthermore, the reports submitted including the so-called "Environmental Re-evaluation Supplemental Report" fail to satisfy the statutory requirements in that:

(a) such environmental factors as are considered are analyzed inadequately;

(b) the purported Environmental Re-evaluation Supplemental Report fail to cover, as one of the "alternatives to the proposed action," the alternative of not building the Lake Chautagua Bridge;

(c) the purported environmental impact statements fail to consider "the implications . . . of the action for population distribution or concentration . . . and . . . the effect of any possible change in population patterns upon the resource base, including land use, water,

and public services, of the area in question" as required by Section 6 (a) (ii) of the CEQ Guidelines for the preparation of environmental impact statements pursuant to NEPA:

(d) the purported environmental impact statements, instead of "accompanying the proposal through the existing agency review process," were written after the basic decision was made through said agency review process or otherwise, to build and fund the Lake Chautagua Bridge, and are merely an ex post facto rationalization of said decision.

(e) The purported environmental impact statements are not "detailed statements by the responsible (federal) official," as required by Section 102 (2) (C) of NEPA; rather their preparation was unlawfully delegated to the applicant for federal funds, NYDOT;

(f) The purported environmental impact statements fail to consider and discuss the Lake Chautagua Bridge as a whole.

(g) Various other environmental factors are not considered.

18. In taking and permitting steps toward construction of the Lake Chautagua Bridge rather than widening and upgrading existing New York Route 17 which would fulfill the same transportation goals, defendants have violated, are violating, and unless restrained by this Court, will continue to violate the requirement of the Federal-Aid Highway Act, 23 U.S.C. Sec. 101, that

> "Insofar as possible in consonance with this objective (completion of the National System of Interstate and Defense Highways) existing highways located on an interstate route shall be used to the extent that such use is practicable, suitable, and feasible, it being the intent that local needs, to the extent practicable, suitable

> and feasible, shall be given equal consideration with the needs of interstate commerce." (Emphasis added.)

19. In taking and permitting steps toward construction of the Lake Chautagua Bridge, defendant Brenegar has violated, is violating, and will, unless restrained by this Court, continue to violate Section 4 (f) of the Department of Transportation Act, 49 U.S.C. Sec. 1653(f), and 23 U.S.C. Sec. 138, pertaining to the use of publicly owned recreation areas.

Both of the above statutory provisions state in pertinent part

> "After the effective date of the Federal Aid Highway Act of 1968 (August 23, 1968) the Secretary (of Transportation) shall not approve any program or project which requires the use of any publicly owned land from a public park (or) recreation area . . . of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof . . . unless . . . there is no feasible and prudent alternative to the use of such land . . . ." 23 U.S.C. Sec. 138; 49 U.S.C. Sec. 1653 (f).

On information and belief the defendants herein have totally disregarded the above statutory provisions and there has never been a determination that there is "no feasible and prudent alternative" to the Lake Chautagua Bridge or that all possible planning to minimize harm has been carried out.

20. In submitting plans to NYDOT for the Lake Chautagua Bridge in taking other steps toward construction thereof, Defendant Schuler, and/or his predecessors in office, acting through NYDOT, have violated, are violating and will, unless restrained by

this Court, continue to violate 23 U.S.C. Sec. 128 which requires that:

> "Any State highway department which submits plans for a Federal-Aid highway project involving the bypassing of, or going through, any city, town, or village . . shall certify to the Secretary (of Transportation) that it has held public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an interestate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway."

On information and belief, only one hearing has been held that being in November, 1965 at the Jamestown Community College. However, on information and belief the corridor involved herein was adopted in May of 1965 and therefore the hearing in the following November was an empty gesture in complete violation of the statutory requirements.

On information and belief, at no time was any hearing held which allowed public consideration of the alternatives to the Lake Chautagua Bridge; the widening and upgrading of N.Y. Route 17; the alternative of not building the Lake Chautagua Bridge at all; or the alternative of developing other modes of transportation such as mass transit and railroads to fulfill the same transportation goals.

Complaint.

The purported hearing in November of 1965 violated the USDOT's Policy and Procedure Memorandum 20-8 (PPM-20-8) promulgated pursuant to 23 U.S.C. Sec. 128 in that it was not "held . . . before the State Highway Department (was) committed to a specific proposal" but, as stated above, after NYDOT had adopted the corridor and excluded the alternatives set forth above.

The PPM-20-8 was further violated in that the hearing in November of 1965 was only a "corridor public hearing" and the "highway designs public hearing" required by PPM-20-8 was never held.

Also, the purported hearing described above was not conducted so as to "ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the need for, and the location of, a Federal-Aid Highway", as mandated by PPM-20-8 (Emphasis added). NYDOT has not properly considered the "economic and social effects" of the Lake Chautagua Bridge," its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community," in satisfaction of 23 U.S.C. Sec. 128.

21. In approving or allowing approval of any and all plans submitted by NYDOT with respect to the Lake Chautagua Bridge and in allowing NYDOT to proceed with plans for the Lake Chautagua Bridge in such a manner as to create pressure for subsequent Federal approvals, defendant Brenegar and/or his predecessors in office has violated, is violating and unless restrained by this Court, will continue to violate 23 U.S.C. Sec. 128.

22. In taking and permitting steps toward construction of the Lake Chautagua Bridge defendants have violated, are violating, and unless restrained by this Court, will continue to violate Section 309 of the Clean Air Amendments of 1970, P.L. 91-604, 84 Stat. 1676,

requiring as a precondition for implementing of any "newly authorized Federal projects for construction" that "the Administrator (of the Environmental Protection Agency) shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this Act or other provisions of the authority of the Administrator." (Emphasis added,)

On information and belief, none of the required materials were ever submitted to the Environmental Protection Agency and no report from the Environmental Protection Agency was ever obtained.

23. By reason of each and every one of the violations of law alleged above, plaintiffs have suffered, are suffering, and will continue to suffer irreparable injury for which there is no adequate remedy at law.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiffs respectfully ask that this Court:

(1) Enjoin defendants, pending final adjudication of this action, from taking or permitting any further steps toward construction of the Lake Chautagua Bridge.

(2) Enter a declaratory judgment that defendants, in taking and permitting steps toward construction of the Lake Chautagua Bridge have violated:

(a) The National Environmental Policy Act;

(b) The Federal-Aid Highway Act;

(c) The Clean Air Amendments of 1970;

(d) The Department of Transportation Act;

(3) Enjoin defendants permanently from taking or permitting any further steps toward construction of the Lake Chautagua Bridge, until such time as defendants

have established to the satisfaction of this Court that they are in full compliance with each and every one of the statutes listed in Prayer for Relief above.

(4) Grant to plaintiffs the reasonable attorney's fees, expert witness fees and other reasonable and necessary disbursements and the costs and disbursements of this action.

(5) Grant such further relief as this Court may deem just and proper.

Respectfully submitted,

s/ RICHARD J. LIPPES

RICHARD J. LIPPES, ESQ.
800 Western Building
Buffalo, New York
856-2513
Attorney for Plaintiffs

AFFIDAVIT IN OPPOSITION TO PRELIMINARY INJUNCTION.

(SAME TITLE).

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

DONALD H. KETCHUM, being duly sworn, deposes and says:

I am the Regional Director of Transportation, Region 5, of the New York State Department of Transportation. Region 5 includes Chautauqua County, where the project which is the subject of this litigation is located. I am fully familiar with the facts and circumstances involving this litigation. The source of my information is personal knowledge and documents and correspondence of the New York State Department of Transportation (NYDOT). I make this affidavit in opposition to plaintiffs' motion for a preliminary injunction.

This litigation involves a portion of the Southern Tier Expressway, and the alleged failure of the defendants to prepare an environmental impact statement (EIS) and a "4(f)" statement, pursuant to 1) the National Environmental Protection Act (NEPA) and 2) the Federal Aid Highway Act of 1966 and the Department of Transportation Act of 1966, respectively. The segment at issue involves a bridge spanning Lake Chautauqua from Stow to Bemus Point.

The general route of the Southern Tier Expressway was authorized in 1962 by Highway Law, §340-c, running from the Broome-Tioga County Line westerly to the Pennsylvania State Line, in the area of Erie, Pennsylvania. The portion at issue, in Chautauqua County, had progressed to the stage in 1965, under applicable State and Federal procedures, where a public hearing was required. The Federal Bureau of Public Roads (BPR), which later became the Federal Highway Administration (FHWA), approved

the Preliminary Location Plans on October 14, 1965 and authorized the inclusion of the bridge spanning Lake Chautauqua as part of the presentation to be made at a public hearing held on November 23, 1965, at the Jamestown Community College (Appendix "A"). The bridge concept had been approved at a conference between NYDOT and BPR on August 17, 1965 (Appendix "B"). The portion of the project covering the bridge is denominated "5C".

On February 21, 1966, BPR acknowledged approval of the transcript of the November 23, 1965 public hearing and affirmed that the requirements of PPM 20-8 were satisfied (Appendix "C"). Authorization was given on May 31, 1966, by BPR, for NYDOT to proceed with the preparation of preliminary design plans (Appendix "D").

In the meantime, on March 9, 1966, the Southern Tier Expressway was designated for inclusion in the Appalachian Regional Development Act highway program by the Appalachian Regional Commission, thereby authorizing 70% federal participation of funding. The primary objective of this program is to promote the economic development of areas found by Congress to be significantly underdeveloped.

On May 3, 1967, FHWA approved the present location of the bridge (Appendix "E"). The Preliminary Design Plans for "5C" were approved on October 7, 1969 by FHWA (Appendix "F"). This constituted "design approval", as construed by FHWA (Appendix "I"). The Advance Detail Plans were approved by FHWA on June 17, 1970 (Appendix "G").

On September 23, 1971, FHWA approved an environmental reevaluation of project "5C", advising that no further environmental action would be required (Appendix "H"). This was in accordance with FHWA Draft Instructional Memorandum dated November 24, 1970 and FHWA NEPA guidelines, dated November 30, 1970, which preceded FHWA's PPM 90-1 issued on August 24, 1971.

Affidavit in Opposition to Preliminary Injunction.

On March 8, 1973, a Supplemental Environmental Reevaluation Report covering "5C" was forwarded to FHWA, which it approved on April 16, 1973 (Appendix "I"). In its letter of approval, FHWA noted that the supplemental report was unnecessary under the FHWA Draft Instructional Memorandum which was in effect prior to PPM 90-1, but was "a thorough analysis of the effects of this project in keeping with the spirit and intent of PPM 90-1".

Formal approval of plans, specifications and estimates (PS&E) was given by FHWA on May 9, 1973 (Appendix "J"). The contract for the bridge substructure was awarded July 9, 1973 and is approximately 3% complete.

Progression of each stage of this project has been in strict accordance with applicable FHWA requirements and has received FHWA approval at each step.

It is submitted that the plaintiffs' motion should be denied on at least three grounds.

First, as noted, every applicable FHWA requirement was met by the State at each stage of progression of this project and FHWA approval obtained thereon. The State has relied on the efficacy of such requirements in committing its own resources to the project and in entering into a contract for the construction of the substructure. Irreparable injury to the State would result were an injunction to issue.

Second, the contractor is currently working on a test pile program which it is anticipated would be completed in late December 1973 or early January 1974. Were this test pile program to be completed, it would allow the winter months for analysis. The contractor would then be in a position to commence pile driving in the spring. Any delay at this time will delay pile driving, thereby extending the completion date into an

additional construction season. This poses the potential of an expensive delay claim against the State, as well as serious inconvenience to the contractor.

Third, the Southern Tier Expressway, in general, and the bridge project, particularly, have received wide publicity over the last several years. Numerous newspaper articles have appeared; conferences with interested individuals and groups were held; and local legislative bodies have considered and approved the project (Appendix "K"). As noted earlier, the project itself has been progressing since 1962, culminating with PS&E approval on May 9, 1973 and a contract award on July 9, 1973. Since 1965, the bridge has been an integral part of the project. The instant litigation, however, was not commenced until November 30, 1973. In view of the wide publicity surrounding this project it would seem that ample opportunity was present to litigate plaintiffs' objections well before now when the State has become committed fiscally and contractually. Such delay, it is submitted, is inexcusable and should constitute an independent basis for the denial of injunctive relief.

WHEREFORE, it is respectfully submitted that the plaintiffs' motion be denied in its entirety.

s/ Donald H. Ketchum
DONALD H. KETCHUM

(Sworn to December 14, 1973).

APPENDIX A — Transcript of Conference, 10-14-65 and Letter, dated 11-18-65.

TRANSCRIPT OF CONFERENCE
October 14, 1965

Administration and Engineering Bldg.
4th Floor Conference Room
State Campus, Albany, New York

SUBJECT: Preliminary Location Plans
Southern Tier Expressway
Stow to Bemus Point
Section "5-C"
Chautauqua County

PURPOSE: The purpose of the conference was to obtain approval of the preliminary location plans on the subject project for presentation at a public hearing.

Present at the October 14 conference were the following:

Main Office

Mr. V. J. Burns
Mr. L. J. Bell
Mr. C. K. Bartholomew
Mr. G. W. Turnes
Mr. B. J. Parker
Mr. E.M. Rowan
Mr. R. C. Seaman (Programming)
Mr. A. M. Ditton (Landscape)
Mr. A. H. Emery (Soils)
Mr. J. B. Fleckenstein (Soils)
Mr. G. R. Perregaux (Soils)

Bureau of Public Roads

Mr. M. W. Groves
Mr. G. A. Strout
Mr. E. R. Gleason

District Office

Mr. E. W. Umiker
Mr. D. T. Heineman

The preliminary location plans of Section "5-C" were presented by the District Office. It was noted that Section "5-C" consists almost entirely of the Chautauqua Lake Bridge which was approved at the August 17, 1965 conference.

The plan as presented showed the horizontal and vertical alignment of the bridge and its approaches along with the configuration of the Route 17J and C.R. 128 interchanges located at the ends of the bridge.

It was stressed that until the subsurface investigations of the Chautauqua Lake crossing are complete, the preliminary plans are subject to probable change. The C.R. 128 interchange and the arrangement of local streets at the Bemus Point side of Chautauqua Lake will also depend on the location and design of the Chautauqua structure.

Appendix A — Transcript of Conference, 10-14-65 and Letter, dated 11-18-65.

A discussion on the feasibility of eliminating the C.R. 128 interchange was also held. It was stated that if these ramps were removed, the traffic that would have used this interchange would have to use the C.R. 13 interchange on the connection to the Route 17 Relief Route. This would, in the opinion of the District Office, overload C.R. 13 and C.R. 128 both main streets within the Village of Bemus Point. It was finally decided that these ramps to C.R. 128 would remain unless the design of the Chautauqua Lake Bridge made it impractical to retain them.

The preliminary plans were then approved for presentation at a public hearing along with Sections "5-D" and "5-E" which were approved at the August 17, 1965 conference.

Appendix "A"

Appendix A — Transcript of Conference, 10-14-65 and Letter, dated 11-18-65.

MASSACHUSETTS
NEW HAMPSHIRE
NEW JERSEY
NEW YORK
RHODE ISLAND
VERMONT
PUERTO RICO

b/1

BUREAU OF PUBLIC ROADS

881 Madison Avenue
Albany, New York 12208

November 18, 1965

Mr. B. A. Lefeve
Deputy Chief Engineer
Department of Public Works
State Campus
Albany, New York

Dear Sir:

Subject: Preliminary Plans, So. Tier Expressway
Salamanca East City Line to U. S. Rt. 219, Section S-N
US 219, Village of Allegany, Section 5-P
Salamanca-West City Line to East City Line
Section 5-M, Cattaraugus County
Stow to Bemus Point, Section 5-C
Cattaraugus County

We have reviewed the transcripts of the October 14, 1965 conference on these projects and your November 5, 1965 comments on Section 5N, and find them satisfactory as noted below.

In view of the situation as to right-of-way negotiations with the Seneca Nation Indians, we are agreeable to your proposal to re-study Section 5-N with the idea of placing both roadways on the south and west bank of the Allegany River.

Consideration should also be given to suitable future connections with the US 219 corridor route, which you are developing under the Appalachia studies.

On Section 5-C, relocation of Ball and Bemus Creeks to the north of the expressway would eliminate Structures #1 and 3.

Sincerely yours,

E. F. Koch

E. F. Koch
Division Engineer

cc: Mr. Sweet
Mr. Burns

DEPT. NOV 19 1965

APPENDIX B — Transcript of Conference, 8-17-65.

TRANSCRIPT OF CONFERENCE
August 17, 1965

Administration and Engineering Bldg.
4th Floor Conference Room
State Campus Site Albany, N.Y.

SUBJECT: Preliminary Location Plans
Southern Tier Expressway
Bemus Point to Strunk Road (Section 5-D)
Chautauqua County

PURPOSE: The purpose of the conference was to obtain approval of the preliminary location plans on the subject project for presentation at a public hearing.

Present at the August 17th Conference were the following:

Main Office

R. W. Sweet
B. A. Lefeve
V. J. Burns
G. W. Turnes
E. J. Parker
K. Marriott
R.C. Seaman (Programming)
A.M. Ditton (Landscape)
W.P. Moody (Soils)
G.R. Perregaux (Soils)

District Office

N. W. Krapf
E. W. Umiker
D. T. Heineman

Bureau of Public Roads

M. W. Groves
J. G. Bestgen
D. J. Philbrick

Mr. Turnes opened the meeting at 11:20 a.m. by stating that the purpose of the conference was to review and approve the preliminary locations plans for Section 5-D (Bemus Point to Strunk Road) of the Southern Tier Expressway for presentation at a public hearing.

Mr. Umiker explained that the District Office contemplates holding one public hearing for both Section 5-D and Section 5-E (Strunk Road to Levant), which will also be reviewed today.

Mr. Heineman then described and explained the preliminary plans of the project.

Appendix B — Transcript of Conference, 8-17-65.

He stated that the District Office felt that the project should be extended for enough north to include the C.R. 13 interchange as the plans indicate. It was explained that since the existing intersection of Rte. 17 and C.R. 13 was hazardous and since all of the traffic destined for Bemus Point would have to use C.R. 13, that the interchange should be included in the design. Mr. Sweet then questioned whether the diamond configuration was adequate at C.R. 13. After reviewing the projected traffic for that interchange it was decided that the diamond type interchange was sufficient. Mr. Burns then asked why the District showed separate structures carrying C.R. 13 over the eastbound and westbound lanes of the expressway. The District explained that since the mall width at the crossing was in excess of 200 feet, two structures were justified.

A discussion was then held on the proposed interchange between the Southern Tier Expressway and the connection to the Route 17 Relief Route. The District explained that the direct connection interchange with a three level bridge was the most suitable type interchange for the existing topography as well as best serving the traffic needs of the area. Concern was expressed about the left lane merger of the interchange ramp from the Bemus Point Bridge running northbound to the Route 17 Relief Route. After some discussion it was decided that while this condition was not desirable it was an inherent characteristic of the type of interchange and could be tolerated. The necessity of providing ramps for all traffic movements at the interchange was also discussed. It was finally decided that the direct connection type interchange was the most desirable and that all of the ramps would be retained. The District Office also agreed to reinvestigate the three-level bridge so as to place the southbound lanes of the Route 17 Relief Route Connection on the middle level, rather than the bottom level so as to reduce the 3.80% grade just to the south of the three level structure. It was also stressed that the minimum grades and curvature should favor the principle traffic movements.

A discussion also evolved regarding the feasibility of constructing the Bemus Point Bridge. After a lengthy review, it was decided that a bridge would be built carrying the Southern Tier Expressway over Chautauqua Lake in the gneral location as shwon on the plans. It was also noted that the eastbound off ramp from the Expressway to old Rte. 17 constituted an isolated off-ramp situation and should be revised to eliminate this condition.

It was also recommended that in the design stage of the Route 17 Relief Route-Southern Tier Expressway interchange care be taken to avoid going from two lanes to four lanes all at once, but instead to proceed from two lanes to three lanes and then to four lanes.

The following additional modifications to Section 5-D were also agreed upon:

1. That the configuration of the suggested westbound roadside rest area and lookout would be changed by the District.

2. That the access ramps at the Strunk Road interchange be shifted further away from the end of the structure carrying Strunk Road over the expressway. Care should also be taken to insure adequate sight distance along Strunk Road through the interchange area.

3. The District also agreed to investigate the condition of the structure carrying Dutch Hollow Road over Dutch Hollow Creek and to determine whether this structure would have to be replaced due to the expressway construction.

The following policy decisions were also made:

1. That the minimum mall width for the Southern Tier Expressway in this section would be 90 feet.

2. In general any time a cross-raod passes over an expressway with median widths in excess of 150 feet, two structures would be required rather than one.

The Preliminary location plans for Section 5-D with the aforementioned modifications were then approved for presentation at a public hearing.

The meeting was concluded at 12:15 p.m.

APPENDIX C — Letter, dated 2-21-66.

MAINE
MASSACHUSETTS
NEW HAMPSHIRE
NEW JERSEY
NEW YORK
RHODE ISLAND
VERMONT
PUERTO RICO

U. S. DEPARTMENT OF COMMERCE
BUREAU OF PUBLIC ROADS
881 Madison Avenue
Albany, N.Y. 12208

February 21, 1966

Mr. B. A. Lefeve
Deputy Chief Engineer
Dept. of Public Works
State Campus
Albany, N.Y.

RECEIVED
DEPT. OF PUBLIC WORKS
MAR - 1 1966
COUNTY ENGINEER
DEPUTY

Dear Sir:

Subject: Public Hearing, Southern Tier Expressway
Stow to Levant, Sections C, D and E
Chautauqua County

We acknowledge receipt of your letter of January 18 transmitting the transcript of the public hearing on the subject project and your certification that full consideration was given to the economic effects of the highway location and to the economic benefits to be derived therefrom.

We have reviewed the transcript and find it satisfactory.

This certification satisfies the requirements of paragraph 4i of our PPM 20-8(1).

Authorization to proceed with the preparation of contract plans is hereby given for Sections D and E. However, for Section C, the Chautauqua Lake crossing, we are requesting further information used as a basis for selection of the proposed location before giving authorization to proceed with contract plans.

In view of the costly construction anticipated, documentation should be furnished reflecting the various determinants affecting alternative routes which have been studied for this section. Your attention is invited to Mr. E. H. Swick's Circular Memorandum of September 15, 1964, on highway location, in this regard. Although general preliminary cost estimates may have been prepared, we believe that the indicated high unit cost of Section C definitely warrants a thorough study and analysis of critical features, e.g., foundation conditions, right-of-way costs, etc., along the various study lines.

Your cooperation in the submission of this information would be appreciated.

Sincerely yours,

J. A. Hanson

J. A. Hanson
Division Engineer

cc:
Messrs. Sweet and Burns

APPENDIX D — Letter, dated 5-31-66.

NEW HAMPSHIRE
NEW JERSEY
NEW YORK
RHODE ISLAND
VERMONT
PUERTO RICO

BUREAU OF PUBLIC ROADS
12-14 Russell Road
Albany, N.Y. 12206

May 31, 1966

Mr. B. A. Lefeve
Deputy Chief Engineer
Dept. of Public Works
State Campus
Albany, N. Y.

RECEIVED
DEP. CHIEF ENG.
JUN - 2 1966

Dear Sir:

Subject: Preliminary Plans
Southern Tier Expressway
Stow to Bemus Point Section 5-c
Chautauqua Lake Bridge
Chautauqua County

We hereby authorize the preparation of preliminary plans for this section, in reply to your letter of May 3, 1966.

We will await information in support of the actual alignment selected, as it develops.

Sincerely yours,

M W Brown

For J. A. Hanson
Division Engineer

cc:
Messrs. Sweet and Burns

APPENDIX E — Letter, dated 5-3-67.

U. S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
BUREAU OF PUBLIC ROADS
REGION ONE
12-14 Russell Road
Albany, New York 12206

May 3, 1967
IN REPLY REFER TO:
01-30.4D

SF
BHF ✓
BP

RECEIVED
DEP. CHIEF ENG.
MAY 5 1967
B. A. LEFEVE
DEPUTY CHIEF ENGINEER

Mr. B. A. Lefeve
Deputy Chief Engineer
Department of Public Works
State Campus
Albany, New York

Dear Sir:

Subject: Southern Tier Expressway
Section 5C, Stow to Bemus Point
Chautauqua Lake Bridge
Chautauqua County

Please refer to your letter of March 7, 1967 with which you submitted the preliminary location plans, typical sections, and profiles for the subject project and the March 27, 1967 location report for the Chautauqua Lake crossing. We find that the location report supports the proposed location of the Southern Tier Expressway at its crossing of Lake Chautauqua shown as Scheme 1 in the location report.

This location south of Bemus Point is approved with the understanding that the results of the new soil exploration contract to be commenced in the near future in this area will be fully considered in establishing the specific crossing location.

We have no specific comments concerning the preliminary plan at this time. We assume that the pavement type as shown on the cross sections, 9" of item 47, is subject to change to a flexible type pavement if this is found to be necessary based on the subsurface exploration and report discussed above.

We note that it is proposed to provide a 40 foot vertical clearance on the lake. Please submit data to support this vertical clearance for our review and consideration.

In view of the poor soils condition in this area, please furnish a copy of the soils report when it is available.

Sincerely yours,

For: J. A. Hanson
Division Engineer

cc:
Mr. Sweet

APPENDIX F — Letter, dated 10-7-69.

U. S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
BUREAU OF PUBLIC ROADS
REGION ONE
12-14 Russell Road
Albany, New York 12206

October 7, 1969

IN REPLY REFER TO:
01-30.4D

Deputy Chief Engineer (Highways)
N.Y.S. Department of Transportation
State Campus
Albany, New York

Dear Sir:

Subject: HC 8971, Project No. 5121
Southern Tier Expressway (5C)
Chautauqua County

The plans submitted with your letter of September 11, 1969 satisfactorily resolve our comments of May 7, 1969. However, we recommend that you clarify the following features on the plans:

1. Sheet No. 2: The depth of Item 59WX (Bit. Stabilized Course) is not shown for the median area. A 3" depth should be adequate.

2. Sheets No. 2, etc.: A slope schedule should be shown on the plans.

These plans are considered satisfactory for further development.

Sincerely yours,

For: Robert E. Kirby
Division Engineer

cc:
Mr. Lefeve

RECEIVED
DEP. CHIEF ENG.
OCT 8 1969
HIGHWAY DESIGN
CONSTRUCTION

APPENDIX G — Letter, dated 6-17-70.

Memorandum

FEDERAL HIGHWAY ADMINISTRATION
Bureau of Public Roads

TO : Mr. Malcolm D. Graham
Deputy Chief Engineer for Design
N. Y. State Department of Transportation

DATE: June 17, 1970

In reply refer to: 01-30.4D

PREL.	FINAL
	LANDSCAPE

RECEIVED
JUN 19 1970
MALCOLM D. GRAHAM

J.STERNBACH	CIRC.
P.D.SMITH	FILE

FROM : Robert E. Kirby
Division Engineer
Albany, New York

SUBJECT: P.I.N. 5121.01 Southern Tier Expressway, Section 5C
Chautauqua County

The advance highway plans for this project submitted with your May 11, 1970 letter are considered satisfactory subject to the following comments:

1. Utility accommodation agreements will be required for this project.

2. Disposition of utilities are not shown in these plans. Accordingly, please show this information on the PS&E plans as required by PPM 40-3.1, paragraph 4i.

3. The plans propose exclusive use of box beam guide rail. We recommend that your criteria for selection of guide rail type be used and that the guide railing with the greatest allowable deflection be used on this project.

4. Please refer to the comment 4 of the consultant's letter of May 21, 1970 and sheet 44 of these latest plans which show Ramp B as a continuation of the outside lane of the expressway. This detail should be changed to make the pavement joints reflect two through lanes.

5. Sheet 2 of the preliminary plans show item 51M in the top 1-1/2" of the 10' median on the Lake Bridge approaches. We assumed that this item was acceptable at that time. However, the advanced plans indicate that Item 51M was deleted. We recommend again that 1-1/2" of item 51M be placed over the item 59W for the reasons we have previously outlined.

(more)

BUY U.S. SAVINGS BONDS REGULARLY ON THE PAYROLL SAVINGS PLAN

Appendix G — Letter, dated 6-17-70.

6. Sheet 27, etc. denotes the payment limits for item 5T (Trench and Culvert Excavation). This should read payment lines in order to be consistent with the latest specification for this item.

7. We suggest that item 106L (Chain Link Fence) be used on this section of the expressway in lieu of the proposed item 106R (Right-of-Way Fencing) because this is generally a recreational type area with probably a high percentage of children.

8. We also recommend that item 106T (Temporary Wire Fence) be included in the contract as it will be needed during construction.

9. The grading plan sheets 46, 50 and 55 are unacceptable. Perhaps these plans should be drawn by a landscape architect rather than by an engineer. Please revise these sheets so that the contour lines will produce an aesthetically pleasing result rather than simply an extension of the typical roadway sections. These revised sheets should be submitted with the PS&E or a note should be included in the proposal to the effect that such revision will be made at a later date.

10. Please advise if there is any parkland involved in or affected by this project.

M W Groves

M. W. Groves
District Engineer

cc: Mr. Lefeve

APPENDIX H — Letter, dated 9-23-71.

Memorandum

FEDERAL HIGHWAY ADMINISTRATION

TO Mr. Malcolm D. Graham
Deputy Chief Engineer Design
N. Y. State Department of Transportation

DATE: September 23, 1971

In reply refer to: 01-30.4D

FROM Robert E. Kirby, Division Engineer
Albany, New York

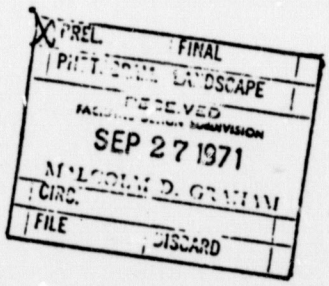
SUBJECT: PIN 5121.01 Section 5C
Southern Tier Expressway
Chautauqua County

Your submission of September 13, 1971 and information previously submitted by your department satisfies the requirement of Section 102(2)(c) of the National Environmental Policy Act of 1969. No further action is required by you as to environmental reevaluation.

We recognize that your department is currently working with the Department of Environmental Conservation to develop specifications which will further reduce the adverse effects of the construction of the bridge. Accordingly, please submit copies of future pertinent correspondence on this subject.

Robert E. Kirby

cc: Mr. B. A. Lefeve





BUY U.S. SAVINGS BONDS REGULARLY ON THE PAYROLL SAVINGS PLAN

APPENDIX I — Letter, dated 4-16-73.

UNITED STATES GOVERNMENT

Memorandum

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

TO : Deputy Chief Engineer for Design
New York State Department of Transportation
Albany, New York

DATE: April 16, 1973

In reply refer to: 01-30.4D

FROM : John G. Bestgen
Division Engineer
Albany, New York

SUBJECT: PIN 5121.01 - Section 5C - Southern Tier Expressway
(Chautauqua Lake Bridge) - Supplemental Report

Your March 8 memorandum requests our concurring with you that the applicable requirements of PPM 90-1 and IM 20-4-72 have been met as a result of the report transmitted with your memorandum.

We concur with your determination. We do, however, wish to point out the following aspects of the matter at this time.

1. FHWA design approval was given on October 7, 1969. Therefore, the requirements of 4(a) of IM 20-4-72 are applicable to this project.

You have met these requirements since this detailed supplemental report - in conjunction with the original report (approved September 23, 1971) - adequately documents the project's effect on the seven economic, social, and environmental considerations listed in 4(b) of IM 20-4-72. The report also fully documents the measures you intend to take wherever feasible and prudent to preclude or minimize identifiable adverse effects of the project.

Thus we concur that the requirements of 4(a) of IM 20-4-72 have been satisfied.

2. Since our design approval was given prior to January 1, 1970, there is actually no requirement in the current issue of PPM 90-1 for an environmental impact statement or a reevaluation for this project. We realize that your original reevaluation was prepared in order to meet the requirements of the FHWA "Draft IM" on NEPA, which was in effect prior to the issuance of PPM 90-1. However, there is certainly no restriction in PPM 90-1 which would preclude your submitting a reevaluation (or supplement thereto) for any project. We, therefore, approve the supplemental reevaluation as a thorough analysis of the effects of this project in keeping with the spirit and intent of PPM 90-1 although the document is not actually required by the provisions of 90-1.

-more-

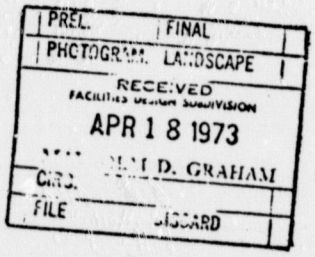


BUY U.S. SAVINGS BONDS REGULARLY ON THE PAYROLL SAVINGS PLAN

Appendix I — Letter, dated 4-16-73.

As you are aware, the procedures of PPM 90-1 have been recently challenged, and there is a very good possibility the Environmental Impact Statements may be required prior to PS&E approvals for all projects in the near future. We, therefore, highly recommend that you make every effort to abide by your tentative scheduling for including this project in your July 1973 letting.

John B. Conway



Appendix "I"

APPENDIX J — Letter of Approval, dated 5-9-73.

LETTER OF APPROVAL AND/OR AUTHORIZATION

STATE PROJECT NO.: FASTE 73-3

FROM: John G. Bestgen
Division Engineer
Albany, New York 12206

PROGRAM NO.:

ITEM NO.: 31

COUNTY NAME: Chautauqua

PROGRAM STAGE (Check): [ ] 1. [X] 2.

TO:

Director
Capital Projects Coordination Bureau
New York State Department of Transportation
Albany, New York 12226

DATE PS&E APPROVED	DATE AUTHORIZATION EFFECTIVE	FEDERAL ROUTE NUMBER / STATE ROUTE NUMBER
5-9-73	5-9-73	P2 / State Route 17

GENERAL LOCATION:

On Southern Tier Expressway - Bridge over Chautauqua Lake. Stow to Bemus Point.

GENERAL DESCRIPTION OF WORK:

Construct substructure for Chautauqua Lake bridge. Also grading of approaches and construction of minor structures on approaches.

YOU ARE AUTHORIZED TO PROCEED WITH THE WORK CHECKED BELOW

PRELIMINARY ENGINEERING TO DETERMINE
- [ ] LOCATION ONLY

PRELIMINARY ENGINEERING FOR SURVEY AND PLAN
- [ ] PREPARATION
- [ ] OTHER (Specify)

- [ ] ACQUISITION OF RIGHT-OF-WAY
- CONSTRUCTION - ADVERTISE FOR RECEIPT
- [X] OF BIDS
- [ ] CONSTRUCTION - PROCEED ON AN AGREED PRICE AND/OR FORCE ACCOUNT BASIS

REMARKS

This project is authorized under the following conditions:

1. There is no commitment or obligation on the part of the United States to provide funds for this highway improvement. However, this project is eligible for Federal reimbursement when sufficient funds are available from the amounts allocated by the Appalachian Regional Commission.

2. That a clause be added by amendment which will incorporate the provisions of the Federal Construction Safety Standards into the contract.

3. That a bid item and related specifications will be added by amendment which will provide for the contractor furnishing support as required for Goble impact load testing.

-more-

DATE	SIGNATURE OF APPROVING OFFICIAL	TITLE
5-9-73	M. W. GROVES	For the Division Engineer

FORM PR-1240 (REV. 8-70) EXISTING STOCKS OF FORM PR-1240 (REV. 8-68) WILL BE USED

Appendix J — Letter of Approval, dated 5-9-73.

4. That pile lengths for east abutment be changed by amendment i.e.: piles to be 15' longer than shown on plans (tip elevation will be 1225 not 1240).

Total Estimated Cost - $18,700,000

Federal Funds Committed - $9,350,000.00

APPENDIX K — Correspondence re Expressway and Bridge.

March 31, 1972

Royal W. Steubing
Assoc-Professor of Biology
Jamestown Community College
Jamestown New York 14701

Dear Sir:

P.I.N. 5121.01
Southern Tier Expressway
Section 5C
Chautauqua Lake Bridge
Chautauqua County

During our meeting on March 22, you requested additional information on the Chautauqua Lake Bridge.

On November 12 & 19, 1965, a notice was published in the Jamestown Post-Journal that a public hearing would be held for that portion of the Southern Tier Expressway that included the Chautauqua Lake Bridge.

The hearing was held on Tuesday, November 23, 1965, in the auditorium of the Science & Engineering Building at Jamestown Community College and was attended by 355 people.

The minutes of this hearing are available for reading or hand copying in this office or for purchase from the recording stenographer.

In reading through the minutes of this hearing there are both comments for and against the bridge. One significant point to note is that the minutes indicate that when two public officials spoke in favor of the plan, including the bridge, there was applause both times.

You requested information on the cost differential between a bridge and a tunnel crossing.

During the planning stage, a tunnel was not considered a reasonable economic alternate because of the cost. An actual study was not made, but another recent project with more favorable soil conditions indicates the cost of a tunnel was four times the cost of a bridge.

The final item requested was the cost comparison between the alternate routes studied for this section of the Expressway. The attached copy of a letter dated February 10, 1966, to B.A. Lefeve from this office gives a review of the factors considered, in addition to a cost comparison that resulted in the selection of the bridge route.

An important factor to remember is that when this report and estimate were made, 1965 cost figures were used. The Engineering News Record, which publishes cost trends in construction, indicates about a 60% increase in construction costs from 1965 to 1971. If this inflation factor is added to the $16,000,000 bridge cost figure used in the report you can see it is quite close to the present estimate we are using for the bridge $26,500,000.

If you have any further questions, please feel free to call on us.

Very truly yours,

I.J. PECNIK
Regional Design Engineer

By Original signed by E.P. Mueller
E.P. Mueller
Associate Design Engineer

EPM:GNR
Attachment

Appendix K — Correspondence re Expressway and Bridge.

THE
FEDERATED SPORTSMEN'S CLUBS
of Cattaraugus County, Inc.

Little Valley, N.Y.
June 26 1972

Mr. D.H. Ketchum
Regional Director N.Y. State D.O.T.
Dovonan Bldg.
125 Main St.
Buffalo N.Y.

Dear Mr. Ketchum;

The Federated Sportsmens Clubs Inc. of Cattaraugus County has invited Mr. Ivan Pecnik to speak to our group July 11. He has asked us to have this request cleared through your office. May you see fit to allow Mr. Pecnik to speak to us as we are very interested in the proposed bridge over Chautauqua Lake.

Yours Truly

s/ H.D. WHITMORE
H.D. Whitmore Secy.
The Federated Sportsmens Clubs
of Cattaraugus County Inc.

Appendix K — Correspondence re Expressway and Bridge.

June 28, 1972

Mr. H.D. Whitmore, Secretary
The Federated Sportsmen's Club of Catt. Co. Inc.
Little Valley NY 14755

Dear Mr. Whitmore:

Southern Tier Expressway
Chautauqua Lake Bridge
PIN 5121.01, Chautauqua Co.

Your letter of June 26, 1972, concerning your invitation to Mr. I.J. Pecnik of my staff to speak on the subject project has been received.

I will be pleased to have Mr. Pecnik speak to your organization on July 11 as requested. I understand that your organization has contacted him with regard to arrangements.

Your interest in this transportation project is greatly appreciated.

Very truly yours,

Original signed by
D.H. KETCHUM
D.H. Ketchum
Regional Director

DHK:MP

cc: Mr. I.J. Pecnik

Appendix K — Correspondence re Expressway and Bridge.

MEMORANDUM
DEPARTMENT OF TRANSPORTATION

Date August 15, 1972

Subject P.I.N. 5121.01
Southern Tier Expressway
Section 5C
Chautauqua Lake Bridge

P.I.N. 5058.06
Pratt Corner-Sinclairville
Rt. 60 - R&P Project

From E.P. Mueller

To File

Mr. Joseph Gerace, Chairman of the Chautauqua County Legislature and Mr. Theodore Vimmerstedt, Chairman of the Highway Committee, requested that Department representatives appear at the Legislature's meeting at 1:00 p.m. on August 11, 1972 to discuss the Rt. 60 R&P project and the Chautauqua Lake Bridge.

Mr. I.J. Pecnik and Mr. E. P. Mueller represented the Department of Transportation at this meeting.

There were approximately 30 County, City, Town and Village officials, plus 62 spectators at the meeting. (The meeting was tape recorded).

The first subject of discussion was Rt. 60 and Mr. Pecnik gave the status of the reconstruction project and the budget problems that have required an indefinite delay. He explained that the D.O.T. has programmed an R&P project for the section of Rt. 60 between Gerry and Sinclairville with anticipated funding from the 100 million R & P funds provided by the State Legislature.

It was noted the scope of this project was widenign Rt. 60 to 24 ft. with 6 ft. shoulders, replacement of the bridge at Hatch Creek, drainage improvement and improvement of the 27 substandard sight distance locations within the right-of-way.

The presentation was followed by a Question & Answer session where the Legislatures indicated they were thankful for this project because it was needed, but did not feel it went far enough.

Mayor Stanley N. Lundine of Jamestown made a strong plea for the Jamestown North-South Arterial and the eventual reconstruction of Rt. 60 as a major highway for its total length.

Memo to File
Sheet 2
August 15, 1972

Various legislative members observed that Chautauqua County has been neglected by the D.O.T. in providing the highway system it needs for survival. The comment was made that Jamestown has suffered economic hardship because delivery and salesmen service is withheld because of the poor highway access. Instead of deliveries once or twice a week, they are made every two weeks, etc.

Another observation was that the County would like more input into the priority determination of state projects. Noting that even though Rt. 60 may not be able to compete for funding with an arterial in Buffalo, they feel it could compete with some other highway projects in the State where new roads were constructed that did not seem to have the same need as Rt. 60.

It was said that Dunkirk and Jamestown must be the two largest population centers in the County that are not connected with an adequate modern highway.

At the conclusion of the Rt. 60 discussion, Mr. Pecnik presented the reasons behind the decision to build the Chautauqua Lake Bridge. He also noted the investment the State already has in this route. This includes engineering and right-of-way costs. Almost all right-of-way is owned by the State (95-100%) and affected owners have been or are being relocated.

Mr. Pecnik noted that although there was some objection at the public hearing in 1965 to the bridge, public officials, planners and businessmen did support the proposed project. Based on this support, economic factors and the fact that the bridge route was consistent with the purpose of the Southern Tier Expressway, the D.O.T. determined it was in the best interest to develop plans which include the Chautauqua Lake Bridge.

At the conclusion of Mr. Pecnik's presentation, Mr. Mueller gave a discussion of the physical characteristics of the structure and the environmental factors that were considered during design.

The environmental factors discussed were:

Silt from run-off from work areas on shore.
Excavation in the lake.
Disposal of dredged material

Memo to File
Sheet 3
August 15, 1972

Water quality of all water returned to the lake.
Jetting of piles.
Retardation of lake flow as a result of the structure.
Noise from the pile driving.
Salt pollution in the lake from the bridge.

This discussion was followed by a Question & Answer period. It appears that although there is still a group of people who oppose the bridge for aesthetic reasons, the environmental questions have been answered.

It appears that most members of the Legislature want the Southern Tier Expressway finished as designed as soon as possible because the County needs it and developers are planning on it.

The meeting completed at about 3:15 p.m., with various legislative members expressing thanks for the information presented.

EPM:GNR

Appendix K — Correspondence re Expressway and Bridge.

CHAUTAUQUA COUNTY LEGISLATURE
County Office Building,
Mayville, New York 14757

November 9, 1972

Mr. D.H. Ketchum
Regional Director
New York State Transportation
Department
General William J. Donovan State
Office Building
125 Main Street
Buffalo, New York 14203

Dear Mr. Ketchum:

I am enclosing a copy of a letter sent to me by Marden Cobb, Chairman of Chautauqua County Planning Board, relative to the completion of the Southern Tier Expressway and Bridge across Chautauqua Lake.

Very truly yours,

s/ JOSEPH GERACE
Joseph Gerace
Chairman
Chautauqua County Legislature

JG:sm
Enclosure

JOSEPH GERACE, Chairman Phone: 753-7111 Ext. 360

Appendix K — Correspondence re Expressway and Bridge.

CHAUTAUQUA COUNTY DEPARTMENT of PLANNING

John R. Luensman
Planning Director

County Office Building, Mayville,
New York

November 8, 1972

Chairman Joseph Gerace &
Members of the Chautauqua County Legislature
County Office Building
Mayville, New York 14757

Re: The completion of the Southern Tier Expressway and Bridge across Chautauqua Lake

Gentlemen:

One of the basic problems which Chautauqua County faces is quality of transportation. The Chautauqua County Planning Board throughout its existance has taken the position that the completion of the Southern Tier Expressway is fundamental to the basic economic survival of the county.

With the elimination of much of the early rail transportation available to serve Chautauqua County, and the expenditures of state and federal funds in the development of the Interstate System of Highways, the southern portion of the county has watched its early transportation advantage slowly dwindle to its present position. The area is basically dependent upon motor vehicles to move the vast majority of its goods and services. We are also aware of the fact that the Penn Central Transportation Corporation is agressively moving toward abandonment of its two north-south lines serving Chautauqua County. This would indicate that the southwestern section of the county will find itself at a greater than ever disadvantage to hold or attract replacement economic activity that is presently oriented to rail transportation in the area.

Appendix K — Correspondence re Expressway and Bridge.

The Planning Board and Highway Committee of the Chautauqua County Board of Supervisors in Resolution 25 of the year 1961 requested a study of a direct truck route from Jamestown to Erie, Pennsylvania. The resolution also suggested that if such a routing was feasible this might then be the alignment that the Southern Tier Expressway would follow.

An unpublished position paper written for the Planning Board suggested the alignment of the Southern Tier Expressway, south of the City of Jamestown to Erie, Pennsylvania, would be more feasible for the survival of the 70,000 persons in the economic community. In 1961 the legislated alignment of the Southern Tier Expressway terminated in Westfield.

In the recent past the County Board of Supervisors and residents of Bemus Point were deeply interested in the construction of a bridge from Bemus Point to Stow. Discussions concerning this topic may be found as early as 1956 in Resolution 36, requesting an engineering analysis of a bridge.

With the inclusion of the Southern Tier of New York State in the Appalachia Region, the Southern Tier Expressway or Route 17 Expressway took on a new character. Up until this time, the Southern Tier Expressway was looked upon as a responsibility of the State of New York as an attempt to maintain the economic vigor of the Southern Tier. With the inclusion of the Southern Tier in the Appalachia Region, the Southern Tier Expressway took on the status of an Appalachia Development Highway System in the State of New York. The concept was that the investment of federal and state funds in this highway would provide for development opportunity not only in the State of New York, but in the northern tier of the State of Pennsylvania.

With this change in viewpoint came a new concept in alignment, namely the termination of the Southern Tier Expressway in the vicinity of Erie, Pennsylvania. Then came the question of whether the alignment should pass around or should pass over Chautauqua Lake. Based on hearings held in late 1965 and amendment of state legislation, the Southern Tier Expressway was legislated to terminate on the New York State-Pennsylvania line. Based on locally expressed desires and needs concerning an improved 4-lane highway from Jamestown to the vicinity of Bemus Point, an examination of costs to go south of Jamestown and through the Hantson Swamp, and past records of expression concerning the need to bridge Chautauqua Lake, a new alignment developed. With the assistance of Appalachia funds, the present alignment of the Southern Tier Expressway bridging Chautauqua Lake in the vicinity of Bemus Point and meeting the Pennsylvania line in the vicinity of Findley Lake was developed. The alignment allows for a greater exposure of Chautauqua County to the opportunity to maintain or raise its present level of economic activity. In instances where the county will lose north-south, capacity it will provide a new east-west transportation capacity for the western sector of the county. The topic of the completion of the Southern Tier Expressway has been on and off the agenda of the Planning Board numerous times in the past decade. The position of the Planning Board has been a very pragmatic one. It is extremely important that Chautauqua County receive this capital investment in order to sustain the present competitive economic position.

We have watched the development of the concern for environment. We have participated in educational programs trying to ignite a new indepth concern for the environment of Chautauqua County. No matter where the Southern Tier Expressway is constructed, no matter where man's activity is placed, it will have an impact on environment.

Appendix K — Correspondence re Expressway and Bridge.

In an examination of the dialogue between the New York State Department of Transportation and the NYS Department of Environmental Conservation, the Board believes that the construction of the bridge as now proposed based on the above noted dialogue, will have the least possible impact on Chautauqua Lake and its watershed. The alignment, as proposed, gets the Southern Tier Expressway in and out of the watershed in the least possible distance. The Department of Transportation has been forthright in presenting the information concerning the problems of the bridge. It provided to the public in the January 28th, 1972 edition of the Post Journal a visual presentation of the completion of the bridge across the lake.

We recognize the environmental impact as being extremely important. There was considerable hue and cry concerning the desecration of certain trout streams in the eastern part of the State, as the Southern Tier Expressway was being planned and we now know at this date that these trout streams did not disappear from existance as was stated by the opponents to the construction. The Board believes that the NYS Department of Transportation and the Conservation Department are capable of protecting the environmental quality dealing with boating and fishing experience on Chautauqua Lake in completion of this highway bridge.

We also look to the question of the capital investment that has already been made in the land acquisition and construction from Stow to the State line. We also look to the capital investment that has been made by the private sector of the economy in the planning and development of facilities predicated upon the completion of the Southern Tier Expressway as presently aligned.

It will have an important impact on the social and

economic structure of the communities through which it passes. The completion of the Southern Tier Expressway as presently aligned, crossing Chautauqua Lake and extending westerly past Sherman and Findley Lake, will provide a number of long-term economic benefits for Chautauqua County, especially concerning internal movement of traffic and the movement of goods and services in and out of the county.

Based on the misleading advertisement to which better than 2000 people responded concerning "The Bridge to Nowhere", and the controversies that have risen since the introduction of Resolution 268-72 which asked the legislative body to endorse the present alignment, the members of the Chautauqua County Planning Board feel that they should take a position and make a recommendation to the legislative body.

It is our opinion that the Chautauqua County Legislature should endorse the completion of the Southern Tier Expressway as presently aligned. This opinion is based upon the following:

1. Based upon the State-Federal concept that the Southern Tier Expressway is a development highway the present proposed alignment is far superior to other suggested alignments.

2. The proposed alignment provides the highest possible exposure of the county for economic stability and economic growth.

3. Based upon the blending of the concept of development and cost, the proposed alignment is the least costly with the highest potential.

4. Based upon the observation of over two years of dialogue between the New York State Department of Transportation and the Department of Environmental Conservation the construction of the bridge across Chautauqua Lake will not destroy the Lake or its fishery.

5. It is acknowledged that the proposed bridge will disturb some people's aesthetic appreciation of what Chautauqua Lake is at this time. However, we do not believe that the bridge will aesthically offend new generations that come to live on or visit Chautauqua Lake.

6. Based upon the fact that a question has been raised about the proposed alignment, the filing of an endorsement resolution puts both the State and Federal government on notice as to local governments position.

The Planning Board therefore, strongly recommends that the County Legislature pass resolution #268-72 and forward it to the proper State and Federal agencies.

Respectfully,

s/ MARDEN E. COBB
Marden Cobb, Chairman
Chautauqua County Planning Board

MC/pb

Appendix K — Correspondence re Expressway and Bridge.

VILLAGE OF PANAMA
Panama, New York 14767

Sept. 22, 1972

Mr. D.H. Ketchum
Region 5 Office
Gen. Wm. J. Donovan State Office Bldg.
125 Main Street
Buffalo, N.Y. 14203

Dear Mr. Ketchum

The Village Board at a recent meeting requested that I write you that the Board approves the proposed bridge over Chautauqua Lake as planned.

Very truly yours

VILLAGE OF PANAMA

s/ BEVERLY EDWARDS
Beverly Edwards
Village Clerk

Appendix K — Correspondence re Expressway and Bridge.

MINUTES OF MEETING
CHAUTAUQUA COUNTY LEGISLATURE
Held at the
County Office Building, Mayville, N.Y.
Wednesday, November 8, 1972, 1:00 p.m.

CHAIRMAN GERACE: The Board will please come to order. The Clerk will call the roll.

(Clerk Coe called the roll and announced that a quorum was present.)

(Legislator Anderson delivered the prayer, followed by pledge of allegiance to the flag.)

(Legislator Bratt Moved to dispense with the reading of the previous month's minutes. Legislator DiRusso Seconded. Unanimously approved.)

CHAIRMAN GERACE: Now we extend to members of the public the Privilege of the Floor. And I would ask and insist that those who address the Legislature address their remarks to matters on the Agenda.

(Mr. Donald Hogan, President of the Chautauqua County Vacationland Association, Inc., a member of the North Harmony Businessmens Assoc., and lives in the Town of North Harmony, read a Resolution passed at the regular monthly meeting of the Chautauqua County Vacationland Assoc. being in full accord with the New York State Department of Transportation plans as proposed to complete the Southern Tier Expressway, including the construction of a bridge spanning Chautauqua Lake. (on file with Board Data of 11/8/72)

I'd just like to point out that the Chautauqua County Vacationland Association is made up of eleven Chambers of Commerce and Businessmens Groups, and they are: Bemus Point, Clymer, Dunkirk, Findley Lake, Fredonia, Jamestown, Lakewood, Mayville, North Harmony, Silver Creek, and Westfield. In addition to that, we

have over three hundred (300) associate members who are helping to support our Association throughout the Country.

Gentlemen, there is no question that we need the Southern Tier Expressway. We need it completed. And we need a bridge across Chautauqua Lake. We sincerely solicit your support for the completion of the Southern Tier Expressway across Chautauqua Lake. It is our opinion it's in the best interest of the County, and important to the largest industry without a smoke stack, and the vacationing and traveling public. Thank you very much.)

(Mr. Philip T. Gravink, Chairman of the Board Peek 'n Peak Recreation, Inc., Clymer, N.Y. read a prepared statement calling for the completion of the Southern Tier Expressway and the bridge across Chautauqua Lake. (on file with Board Data of 11/8/72)

CHAIRMAN GERACE: Does anyone else wish to address the Board? If not, Privilege of the Floor will terminate, and we will move on Mr. Clerk.

FROM THE TABLE -
RESOLUTION NO. 268-72 was read by the Clerk. By the Public Works Committee and Others. Endorsing the Completion of the Southern Tier Expressway.

CHAIRMAN GERACE: The resolution had been tabled for two months (Tabled 9/8/72) and unless there is some objection, we'll decree that this is on the floor. Any discussion?

LEGISLATORS' MINUTES, CHAUTAUQUA COUNTY, MAYVILLE, N.Y., NOVEMBER 8, 1972. Pg. 2

LEGISLATOR VIMMERSTEDT: Mr. Chairman, I would like to Amend the resolution by adding another Resolved:

"BE IT RESOLVED, That copies of this resolution be submitted to Donald Ketchum and also to the Commissioner of Highways of New York State."

(Legislator Trusso SECONDED the Amendment.)

CHAIRMAN GERACE: It has been moved and seconded to amend the resolution. Any discussion?

LEGISLATOR JOHNSON: I have a sneaky feeling that when you send resolutions to people they don't read them. And I think we ought to instead send a real strong letter from you, Mr. Chairman, if this does pass, that we do indeed want the bridge; send it in a form whereby they are not just going to take and file it in the wastebasket, like they do the rest of these things in Albany and where else we send them. And send some strong letters from now on from the Legislative Body with your signature on it, so they will indeed read them; even if we have to send them by certified mail to be sure they read them.

LEGISLATOR SMITH. Mr. Chairman, earlier this year Legislator Anderson and I sponsored a resolution requesting a meeting with the Department of Transportation relative to the bridge. And, Mr. Anderson, I'm sure, will support what I'm going to say: Contrary to what has been said in other places, we did not submit that resolution in opposition to the bridge. Very clearly, if someone is willing to listen, our intent was to make more information available on the bridge; especially, in light of the event that the design concept of the bridge had changed from the original; secondly, an Environmental Impact Study had been since authorized and no one, at that time, had seen that Environmental Impact Study in Chautauqua County - not even anyone in our Planning Department. So the intent of that resolution was to in affect lay some of the cards on the table and make this a two way street. I think we accomplished that, as witnessed by what happened here last month, and as witness the fact this resolution is being brought off the table this afternoon.

I intend to support the resolution; primarily because it's my interpretation that the people of my legislative district are in support of the bridge. So I will cast my vote in favor of the resolution.

LEGISLATOR ANDERSON: I agree with Mr. Smith. I think our intent has been accomplished to bring about an honest discussion of this matter, which hadn't been done up until the last few months.

As I've stated before, I believe the majority of the people in my district have been opposed to this. However, some of the objections have been satisfied. I am glad the ecological report and considerations have been read into the record. I think that makes many of us feel more comfortable. There is one aspect, however, that I have not been satisfied with, and that is a description really of what it is going to look like and what can be done to make this as attractive as possible.

With these remarks, I request that when this is passed (and I am reluctantly going to support it) that my remarks be sent to the State. I would like more information on the aesthetics: Are there going to be plantings along the approaches? What's this going to look like? What color is the bridge going to be? These are things we have a right to know because we are living here and have to look at it. So I am going to support it, even as Mr. Smith is.

LEGISLATORS' MINUTES, CHAUTAUQUA COUNTY, MAYVILLE, N.Y., NOVEMBER 8, 1972 Pg. 3

LEGISLATOR LEPKOWSKI: I am glad everybody is in full support of this important bridge and Expressway. As you know I have been for it for quite a long time.

I have received acknowledgments from several people in support of this bridge. We have received acknowledgments from Chautauqua County Supervisors

Association, Chautauqua County Highway Superintendents Association, Chautauqua County Planning Board (on desks), and the Chautauqua County Vacationland Association.

I would like to point out - as we here in Chautauqua County have an economic problem with employment and businesses sometimes have left the County or have gone bankrupt (such as Art Metal) - we need the new assessment which new businesses around these interchanges are going to bring; New construction will help the economy - the added employment for those performing the construction; also for those who will be added to the work force for these new businesses which will be arising. I'd also like to point out that this highway would make all parts of Chautauqua County accessible.

LEGISLATOR CLOTHIER: With Mr. Vimmerstedt's approval, I'd like to add on to his amendment: Also that copies be sent to our State Senators and State Assemblymen.

LEGISLATOR VIMMERSTEDT: I would agree to that. Amend the resolution by adding another Resolved clause to read:

and be it
"FURTHER RESOLVED, That copies of this resolution be sent to Donald Ketchum, and also to the Commissioner of Transportation of New York State, and also to our State Legislative representatives".

(Legislator Trusso (Second) agreed to the added Amendment.)

CHAIRMAN GERACE: Action now comes on the Amendment. Any discussion? If not, all those in favor say Aye. Opposed Nay. Carried.

Now action comes on the resolution as amended. Any discussion?

(Legislator Smith agreed with Mr. Johnson's suggestion and said: When we have a resolution and amendment like this we ought to request either the Chairman or the Clerk write a letter to the appropriate people named, stating clearly what our intent is.)

(Chairman Gerace agreed with Mr. Johnson and Mr. Smith: That many resolutions that come from County Legislatures sometimes get filed with a committee or are handled by people in the office and just filed away. I will send a letter and copies of the remarks to the people mentioned in the amendment.)

LEGISLATOR VIMMERSTEDT: The only reason I offered that amendment: On October 26th I was in conversation with Don Ketchum and he told me at that time, that unless the Legislature of Chautauqua County acted favorably upon this business, that the chances were the completion of the Southern Tier Expressway would not take place for another ten (10) years, and if they wanted a different route it would require considerable time spent in additional studies and public hearings. And that is why I included him in my amendment, so he would get a copy of this. And I hope if it is passed unanimously, notation will be made that it was given unanimous approval.

LEGISLATORS' MINUTES, CHAUTAUQUA COUNTY, MAYVILLE, N.Y., NOVEMBER 8, 1972 Pg. 4

CHAIRMAN GERACE: The resolution itself does not mention a bridge per se, but I assume that's contemplated in the resolution?

LEGISLATOR VIMMERSTEDT: Yes.

CHAIRMAN GERACE: All right, if that's the understanding, action now comes on the resolution. If there's no further discussion, all in favor say Aye. Opposed Nay.

Appendix K — Correspondence re Expressway and Bridge.

RESOLUTION NO. 268-72
UNANIMOUSLY ADOPTED
as AMENDED

(Legislators Lepkowski and Clothier asked that the remarks of Mr. Donald Hogan and Mr. Philip Gravink also be forwarded with Resolution 268-72.

Chairman Gerace said copies of their remarks would be sent also.)

Appendix K — Correspondence re Expressway and Bridge.

COUNTY LEGISLATIVE HEARING November 8, 1972

Chautauqua County legislatures and concerned people of Chautauqua County. I would like to speak to you today as President of NYSAOA, Director of NYS Winter Sports Council, member of Clymer School Board, a business man and investor in French Creek, N.Y. According to a recent ad in the Jamestown paper, I live in downtown Nowhere, USA. This really is not news to us, by looking at the atlas, we find you have to go to Western Kansas to find a township or school district further from the state capital than French Creek, N.Y. When we see the difficulty with which state highway funds flow to Western Chaut. Co., it appears that Albany has considered us "Nowhere" for quite some time. However, if Jamestown or Mayville considers us Nowhere, it is time that we set the record straight.

I would like to tell you a little of what goes on in "Nowhere", USA. Last winter in less than 100 days, over 100,000 skiers spent over 1 million dollars in French Creek...Over 95% of them were from out of state. Nationally, we call this a favorable balance of trade. . . In contrast to manufacturing and farming, where a high percent of the revenue dollars immediately leave the county to buy in raw material, component parts, feed, fertilizer and the like, over 70% of the revenue from recreational services was paid out to Western Chaut. Co. citizens and businesses in the form of salaries, services and interest. If these skiers were typical of what national statistics indicate, they spent an additional 2 million dollars for food, gas, entertainment and shelter while they were away from home. The total economic impact, as the payroll dollar are respent locally, is estimated at 600-700% of the original resort revenue.

On the strength of finally seeing some serious highway dollars spent on bridges and right-a-ways for the Southern

Tier Expressway in the Findley Lake area, our company embarked on a 3 million dollar expansion plan which will not only triple or quadruple sales, but give us year round viability.

I can personally document facts that what is happening in French Creek first in skiing, but also in four season vacation, convention and 2nd home services, is also in various stages of study, planning and development in Stow, Hartfield, Bemus Point, Sinclairville, Randolph, Napoli, Ellicottville, Allegany, Addison and perhaps other towns. All are multi-million dollar investments, all of necessity are designed to preserve the environment and natural beauty of the Southern Tier, all are private capital and dependent on local employees and services.

It is interesting to note the growth of tourism in the Mackinaw Bridge area of central Michigan. They have snow, rolling wood covered hills, good fishing lakes and a big bridge with a super highway off both ends. It is clear to us that that area is our only true competition for the 35 million people within a 7 hour super highway drive of either Central Michigan or Chaut. Co.

It is also interesting to note that the only current major addition to the National Park System falls in the shadow of the Golden Gate Bridge of California. Apparently there a bridge, though granted much larger, is an attraction worthy of National Monument rather than an "eye sore" and "degradation of the environment."

Why shouldn't we turn our attention to the tourism industry for new vitality to the economics of the Southern Tier. Statistics of the past 2 decades show sizable declines in the area employment in both agriculture and industry . . . By the end of the 70's, the four day work week and the monthly mini-vacation will be standards for most industry and their employee families. The

Cleveland area presently has the 2nd highest disposable income of any metropolitan area in the country. We have the lakes, the snow, the hills and the scenery and the ingenuity to put them together. We have the market to serve, we lack a road on which to move them to us.

The Pennsylvania Transportation Dept. has redocumented its promise to constr ct the connecting link from our expressway to I-90 . use by 1976, provided it doesn't end in a maple grove west of Findley Lake. The NYS Transportation Dept. has made its intention equally clear. The legislature of this county must eliminate any doubt of the desire and need for the bridge and completed Southern Tier Expressway by the people of this country. Private recreation businesses are ready to respond with a multiple of that investment.

Respectfully submitted,

Philip T. Gravink
Chairman of the Board
Peek 'n Peak Recreation, Inc.

Appendix K — Correspondence re Expressway and Bridge.

Mr. Donald Hogan read at 11/8/72 Legislators Meeting.
(re: Reso. 268-72)

RESOLUTION BY ANDERSON----

BE IT RESOLVED THAT,

Whereas Chautauqua County Vacationland Association, Inc. is primarily interested in the promotion of Chautauqua County and the development of its tourist and recreation business and,

Whereas the tourist and recreation business is dependent upon the traveling public having easy access to Chautauqua County and,

Whereas the completion of the Southern Tier Expressway will mean the addition of a new and modern highway system offering improved access to Chautauqua County by the motoring public,

Now therefore be it resolved that Chautauqua County Vacationland Association, Inc. is in full accord with the New York State Department of Transportation plans as proposed to complete the Southern Tier Expressway, including the construction of a bridge spanning Chautauqua Lake.

SECOND BY BLOOMQUIST AND GRAVINK

REMARKS BY GRAVINK, BLOOMQUIST, P. WEBB, LYONS, MEAD.

Delegates in support: Fredonia, Westfield, Mayville, North Harmony, Bemus Point, Jamestown, Clymer and Lakewood. One Mayville delegate abstained.

For the resolution: 12 delegates or alternates
Opposed : none
Abstained : 1

The resolution carried.

s/ NEIL CHAFFIE
Neil Chaffie
Administrator

RESPONSE TO ORDER TO SHOW CAUSE.

(SAME TITLE).

The defendant, Claude S. Brinegar, as Secretary of Department of Transportation, by John T. Elfvin, United States Attorney in and for the Western District of New York, responds to the Order to Show Cause in this case, as follows:

FIRST: Adopts as part of his response the affidavit of Donald H. Ketchum, filed on behalf of the defendant, Raymond T. Schuler, Commissioner of New York State Department of Transportation.

SECOND: Asserts to the Court that the objective of this lawsuit, as is evidenced by the complaint, is not to litigate whether the bridge over Lake Chautauqua should be built, but is, instead, whether certain procedural administrative action has been properly taken, and, if not, whether the Court should enjoin Federal funding of the project until such procedural action and determinations based thereon have been effected; that whatever the merits of such issue, this case might be fully resolved by determination of the issue raised in said Donald H. Ketchum's affidavit that plaintiffs are guilty of laches; that defendant Brinegar urges an early hearing solely on the issue of laches as was done in Clark v. Volpe (E.D. La. 1972) 342 F. Supp 1324, 4 E.R.C. 1254, Aff'd. 461 F.2d 1266.

DATED: Buffalo, New York, December 17, 1973

JOHN T. ELFVIN
United States Attorney in and for
the Western District Of N.Y.
502 U.S. Courthouse
Buffalo, New York 14202

By: /s/ C. Donald O'Connor
C. DONALD O'CONNOR
Assistant United States Atty.

ANSWER TO COMPLAINT.

(SAME TITLE).

Defendant Raymond T. Schuler, by his attorney Louis J. Lefkowitz, Attorney General of the State of New York, answering the complaint herein:

1. Denies the allegations contained in paragraphs numbered "2", "3", "6", "7", "11", "12", "14", "15", "16", "17", "18", "19", "20", "21", "22" and "23" of the complaint.

2. Denies information sufficient to form a belief as to the allegations contained in paragraphs numbered "5" and "8" of the complaint.

3. Admits all of paragraph numbered "13", except that part which reads, "The above described Corridor was adopted on May 10, 1965."

FIRST DEFENSE

4. Plaintiffs lack standing to maintain the action.

SECOND DEFENSE

5. The Court lacks jurisdiction of the subject matter of the action.

THIRD DEFENSE

6. The Court lacks jurisdiction of the person of defendant.

FOURTH DEFENSE

7. The complaint fails to state a claim against defendant upon which relief can be granted.

FIFTH DEFENSE

8. The action is barred by laches.

WHEREFORE, defendant demands that the complaint herein be dismissed, together with the costs and disbursements of this action.

Answer to Complaint.

DATED: Albany, New York
December 19, 1973

Signed:

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Defendant Schuler
Office and P. O. Address
The Capitol
Albany, New York 12224

By s/ Douglas S. Dales, Jr.
DOUGLAS S. DALES, JR.
Assistant Attorney General

TO: RICHARD J. LIPPES, ESQ.
Attorney for Plaintiffs
Office and P. O. Address
800 Western Building
Buffalo, New York 14202

HONORABLE JOHN T. ELFVIN
United States Attorney
Office and P. O. Address
502 U.S. Courthouse
Buffalo, New York 14202

ORDER OF REFERENCE.

(SAME TITLE).

This matter having come on before this Court upon the application of plaintiffs for a preliminary injunction, and upon the motion of the defendant, Brinegar, for a hearing solely on the issue of laches and/or delay and the equitable considerations in connection therewith, and upon the agreement of the parties that such hearing is necessary, and good cause appearing therefor, it is

ORDERED: that this matter is hereby referred to United States Magistrate Edmund F. Maxwell, as special master, to hear and report with all due dispatch, the facts of this matter concerning the issue of laches and/or delay and the equitable considerations in connection therewith as they relate to the appropriateness of granting a preliminary injunction or dismissing this action.

DATED: Buffalo, New York, January 17th, 1974

/s/ John O. Henderson
United States District Judge

STIPULATION.

(SAME TITLE).

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, that the Order of Reference in the form annexed hereto may be entered by this Court upon the application of any party hereto and without further notice.

DATED: Buffalo, New York, January 14, 1974

s/ RICHARD J. LIPPES
RICHARD J. LIPPES
Attorney for Plaintiffs

LOUIS J. LEFKOWITZ
Attorney General for the State of New York
Attorney for Defendant, Schuler

By: s/ DOUGLAS S. DALES, JR.
DOUGLAS S. DALES, JR.
Assistant Attorney General

JOHN T. ELFVIN
United States Attorney in and for the Western District of New York
Attorney for Defendant, Claude S. Brinegar

By: s/ C. DONALD O'CONNOR
C. DONALD O'CONNOR
Assistant United States Attorney

ANSWER.

(SAME TITLE).

The defendant, CLAUDE S. BRINEGAR, as Secretary of Transportation of the United States of America, by John T. Elfvin, United States Attorney in and for the Western District of New York, answers the complaint in this action, as follows:

FIRST: Denies the allegations of the complaint contained in paragraphs "3", "6", "7", "11", "12", "14", "15", "16", "17", "18", "19", "20", "21", "22" and "23".

SECOND: Denies knowledge or information sufficient to form a belief as to the allegations of the complaint contained in paragraphs "5" and "8".

THIRD: As to the allegations of the complaint at paragraph "13", admits said allegations, except denies those parts which read:

> "The above-described Corridor was adopted on May 10, 1965"
>
> "....which includes 1.635 miles of structure over Lake Chautauqua..."
>
> and "It is estimated that the total cost of Sec. 5C, Bemis Point to Stedman, will be approximately twenty-two point eight (22.8) million dollars".
>
> AND FOR SEPARATE AFFIRMATIVE DEFENSES, STATES:

FOURTH: Plaintiffs lack standing to maintain this action.

FIFTH: This action is barred by laches.

SIXTH: Plaintiffs have failed to name an indispensable party as a defendant in this action, namely the Appalachian Regional Commission.

Answer.

SEVENTH: The major federal action in this case was the approval of the Southern Tier Expressway by the Appalachian Regional Commission as a total economic development project in accordance with the special public purposes of that act, which occurred prior to the effective date of National Environmental Policy Act.

EIGHTH: That statutes designated in the complaint alleged to have been violated by defendants are inapplicable to the Southern Tier Expressway which is a highway project approved under the Appalachian Regional Development Act of 1965, as amended (49 App. U.S.C., §201).

NINTH: The complaint fails to state a claim against defendant upon which relief can be granted.

WHEREFORE: the defendant, CLAUDE S. BRINEGAR, demands judgment dismissing the complaint, denying any relief to plaintiffs, and awarding costs to said defendant.

DATED: Buffalo, New York, January 21, 1974

JOHN T. ELFVIN
United States Attorney in and for
the Western District of New York
Attorney for Defendant, Claude
S. Brinegar, Secretary, Dept. of
Transportation
Office and P. O. Address
502 U.S. Courthouse
Buffalo, New York 14202

By: /s/ C. Donald O'Connor
C. DONALD O'CONNOR
Assistant United States Attorney

REPORT AND RECOMMENDATION.

(SAME TITLE).

EDMUND F. MAXWELL, United States Magistrate

Appearances: Richard J. Lippes
Counsel for the Plaintiffs
800 Western Building
15 Court Street
Buffalo, New York

Louis J. Lefkowitz,
Attorney General for the
State of New York
by Douglas Dales,
Assistant Attorney General
Justice Building
Albany, New York

John T. Elfvin,
United States Attorney
By C. Donald O'Connor,
Assistant United States Attorney
502 United States Courthouse
Buffalo, New York

On November 23, 1973, the plaintiffs herein commenced this action seeking to enjoin the defendants from continuing the construction of a bridge over Lake Chautauqua. In their complaint and motion for a preliminary injunction, plaintiffs contend that the

[2]
defendants have failed to comply with the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §4321, the Federal Aid Highway Act, 23 U.S.C. §101, the Clean Air Amendments of 1970, P.L. 91-604, 84 Stat. §1676, and the Department of Transportation Act, 49 U.S.C. §1651. The main thrust of their complaint is that public hearings as required by the statutes were

not held, that an Environmental Impact Statement (EIS) as required by Section 102(2)(C) of NEPA was not filed, and that a similar statement as required by Section 4(f) of the Department of Transportation Act, 49 U.S.C. §1653(f) and by 23 U.S.C. §138, was not filed. They further allege that the proposed construction of the bridge was not reviewed and commented upon in writing by the administrator of the Environmental Protection Agency (EPA) as required by Section 309 of the Clean Air Amendments of 1970.

The defendants have generally denied the allegations set out in the complaint and have also set out various affirmative defenses, including an allegation that the action is barred because of laches.

By stipulation of the attorneys for the parties and by order of this court, the matter was referred to the undersigned as special master to hear and report

[3]

> ". . . the facts of this matter concerning the issue of laches and/or delay and the equitable considerations in connection therewith as they relate to the appropriateness of granting a preliminary injunction or dismissing this action."

Pursuant to said order, testimony was taken and evidence introduced as to the question of laches. In most instances, the facts brought out at the hearing and hereafter set out as findings of fact were not disputed. However, the plaintiffs contend that the facts which relate to those portions of the Southern Tier Expressway other than the construction of the bridge itself, (Section 5C), are not relevant or material to the issues in this action.

Findings of Fact

In 1962, pursuant to New York State Highway Law, §340-C, the general route of a highway designated as

the Southern Tier Expressway was authorized. This highway was to run in a generally westerly direction from the Broome-Tioga County Line, near Binghamton, New York, a distance of approximately 250 miles to the Pennsylvania State line in Chautauqua County. The portion of the proposed highway which lies within Chautauqua County is approximately 35 miles long and is designated as Section 5.

[4]
Section 5C includes the bridge spanning Chautauqua Lake from Stow to Bemus Point. This section is approximately 2.5 miles long and includes approximately .8 miles of structure over Lake Chautauqua and .18 miles over relocated Main Street and relocated Bemus Creek.

In August 1965, the concept of such bridge was approved by the United States Bureau of Public Road (USBPR). In October 1965, the USBPR approved the Preliminary Location Plans and in November 1965, a public hearing relative to the construction of approximately 14 miles of the Southern Tier Expressway, including Section 5C, was held in the City of Jamestown, New York. In February 1966, the USBPR approved the transcript of the public hearing as satisfying the requirements of its Policy and Procedure Memorandum then in effect. In March 1966, the Appalachian Regional Commission designated the Southern Tier Expressway for inclusion in the Appalachian Regional Development Act Highway Program, the primary objective of the program being to promote the economic development of areas found by Congress to be significantly underdeveloped. In May 1967, the USBPR in a letter to the New York State Department of Public Works approved the location of the bridge to be constructed across the lake.

[5]
On January 1, 1970, NEPA was enacted into law.

Report and Recommendation.

On March 30, 1970, the USBPR authorized the commencement of negotiations for acquisition of a right of way in connection with Section 5C. On May 24, 1972, the Federal Highway Administration (FHWA), formerly the USBPR, granted Plans, Specifications and Estimates (PS&E) approval for contracts calling for the demolition of buildings on the rights of way encompassing Section 5C and portions of the bridge approaches located in Sections 5B (on the west side of Lake Chautauqua) and 5D (on the east side of Lake Chautauqua). These demolition contracts were awarded in June 1972, and the demolition work was completed in August 1972. Approximately 70 buildings were demolished and 20 families in Section 5C have been relocated. Construction of the bridge was planned in three phases: (1) demolition, which was completed in August 1972: (2) construction of the substructure of the bridge; and (3) construction of the superstructure of the bridge.

On May 9, 1973, the FHWA granted PS & E approval for construction of the bridge substructure. On July 9, 1973, a contract in the amount of $14,700,000 was awarded to Raymond International, Inc. for construction of the bridge substructure.

[6]

Between July 9, 1973, (the contract award date), and November 23, 1973, (the date of commencement of this action), trees have been removed, land has been stripped, channel relocation work, dredging, and other general work preparatory to the driving of pilings and construction of the substructure has been done. Subsequent to November 23, 1973 and prior to January 17, 1974, one of a contemplated five test pilings was put in. As of December 14, 1973, the contract for the bridge substructure was approximately 3 percent complete (affidavit of Donald Ketchum, Regional Director, New York Department of Transportation, Exhibit S-2), and

approximately $4.7 million has been spent on the project from 1962 to date. The present contract for the substructure calls for the installation of approximately 250 pilings and for completion of the substructure in June 1976. A contract for the superstructure of the bridge would be expected to be completed one to two years thereafter and, thus, according to present expectations, the bridge could carry traffic in 1977 or 1978. The total estimated cost of the completed bridge is about $29 million.

THE QUESTION OF LACHES

The question of the erection of the bridge over Lake Chautauqua has been the subject of much discussion

[7]
and publicity from at least 1965. One public hearing was held in accordance with then existing Federal law, there have been numerous meetings over the years between public officials and interested citizens (including some of the plaintiffs), and there has been extensive newspaper publicity given to the issue. All of the municipal and regional planning boards in the area have included the concept of the Southern Tier Expressway in their programs and all of the maps and designs put out by these boards show a contemplated bridge over the lake between Stow and Bemus Point. Thus, there is no question that the plaintiffs were, or should have been, aware of the fact that a bridge was contemplated. Plaintiffs also were, or should have been, aware in the summer of 1972 that buildings were being demolished in contemplation of the bridge construction.

Defendants contend that as early as March 1972, plaintiffs were aware of the fact that no EIS had been filed (transcript, p. 293, 299) and that if plaintiffs sincerely wished to contest the matter, action should have commenced within a reasonable time thereafter,

and in any event before the Federal Government had given PS & E approval and before the contract for the bridge substructure had been let.

[8]

The plaintiffs in fact admit knowledge that the bridge was planned over the lake. However, they claim that their concern about the possible environmental effects of its construction was long known to the defendants, that they had the right to assume that the defendants would comply with the law and that they were not certain that the bridge would be built until such time as PS & E approval was actually granted in May 1973. They cite the testimony of Mr. John Bestgen of the FHWA that the Federal Government was not committed to finance the bridge until May 9, 1973, the date of PS & E approval (transcript p. 277). They further contend that the delay from May 1973 until November 1973 when suit was instituted was not unconscionable in the circumstances of this type of case.

The defendants herein cite the case of Clark v. Volpe, 342 F.Supp. 1342 (E.D.La. 1972), 4 ERC 1254, aff'd. (CA 5 1972) 461 F.2d 1266, cert. denied 409 U.S. 1041, in furtherance of the contention that laches should apply in this case. The Clark case, in holding that laches applied, stated that the facts and circumstances of the particular case were determinative, and cited Burnett v. New York Central Railroad Company, 380 U.S. 424, 435 (1965) wherein the court held that:

[9]

> "Whether laches bars an action in a given case depends on the circumstances of that case . . . ."

Thus, if the question of laches were to apply in a case of public interest, such as this, the facts peculiar to the case must be considered.

Defendants contend that in considering the applicability of laches to this case, the facts and circumstances relating to the construction of Sections 5A (Pennsylvania State line to Sherman, 10 miles), 5B (Sherman to Stow, 10 miles), and 5D (Bemus Point to Jamestown, 6 miles), as well as the facts relating to 5C, should be considered.

According to the testimony on the hearing, the stages of completion of these sections is as follows:

> Section 5A - Grading and structure contract complete, but no paving done as yet. Approximately $14 million spent. (This section has not received any Federal financing.)
>
> Section 5B - Right of way has been acquired and buildings have been demolished (transcript p. 30). There has been no design approval or PS & E approval as yet. An EIS is being prepared (transcript pp. 285, 286).

[10]

> Section 5D - Right of way has been acquired, buildings have been demolished, and a construction contract is in the process of being awarded to the low bidder.

There was testimony and evidence that if a bridge was not built, some or all of Sections A and B might be salvaged if an alternate route was found, and Section 5D would be used even if the bridge was not constructed.

In the case of Monroe County Conservation Council, Inc., et al. v. Volpe, (CA 2 1972) 472 F.2d 693, the defendant contended that the fact of completion of two unconnected legs of the Rochester, New York "Outer Loop" should be considered in determining whether it should be enjoined from granting Federal approval for the connecting section of the highway for which a proper EIS had not been prepared. The court stated at page 698:

> "The crux of the Secretary's argument, however, is that NEPA does not apply to a project which was as far advanced as this one on the effective date of the Act, January 1, 1970. But it is only this specific 4.25 mile segment of highway which is of concern. It is true that other portions of the contemplated "Outer Loop" have been completed, but that fact does not in any way obligate the federal government to fund the section in question here."

[11]

While the question of laches was not in issue and while the PS & E approval had not been granted in the Monroe County case, it is germane to this case where the propriety of the issuance of the PS & E approval is in issue. This is particularly so where Section 5D of the planned expressway will be used in any event and where, irrespective of the results of this case, the completion of Section 5B with Federal financing will not be assured until an acceptable EIS is prepared and PS & E approval granted for that section. Thus, in making a determination in this case, only those facts relating to the construction of Section 5C are being considered.

Defendants further contend that plaintiffs' cause of action was fully ripened in May 1972 when PS & E approval was given for the demolition of buildings on the land leading to the bridge site, and thus argue that delay to the prejudice of defendants should be charged against the plaintiffs as of that time. But in the Monroe County case, supra., the court held that (p. 699):

> "With regard to highway aid, the federal government is not obligated to fund a particular project until the Secretary of Transportation has approved plans, specifications, and estimates for the construction. 23 U.S.C. §106(a) (P.S. & E. approval)."

[12]
and Mr. Bestgen testified that the FHWA was not committed to the financing of the bridge until PS & E approval was given for the bridge substructure in May 1973.

Thus, if the defendant Federal Government could have withdrawn its support as late as May 1973, it does not seem reasonable to hold that the plaintiffs should be charged with delay for failing to bring action within the year before such commitment.

In the case of I-291 Why? Association v. Burns, et al. (Dist. of Conn., Civil No. H-229, decided Feb. 7, 1974), the court in passing on a similar argument advanced by governmental defendants, held that:

> "The better position, as suggested in Clark v. Volpe, supra. is to allow one opposed to a proposed federally-funded highway to presume, in the absence of evidence to the contrary, that public officials will properly fulfill their statutory obligations until such time as P.S. & E. approval makes the commencement of actual construction imminent. Once P.S. & E. approval issues, a potential plaintiff must decide if there is sufficient reason to warrant suspicion of non-compliance. If such suspicion is justified, the plaintiff must then act diligently to develop its case and, if this results in a good faith belief in non-compliance with pertinent statutes, file its complaint." (p. 26 of the court's ruling on motion for preliminary injunction.)

[13]
While plaintiff Steubing had been advised by the State defendant in 1972 that an EIS was not required under the law (transcript p. 299), that fact should not accrue to the benefit of the defendants in this action which seeks a determination as to whether the EIS is actually required.

Nor should the delay in commencing suit be held against plaintiffs, when no lawsuit would have been necessary, if, during that period, the defendant FHWA had decided not to grant PS & E approval or had decided that an EIS would be required.

Defendants have contended that FHWA memoranda relating to the procedures to be followed for projects in progress as of January 1, 1970 (the effective date of NEPA) obviated the requirement of an EIS for those projects wherein "design approval" had been granted by the FHWA prior to February 1, 1971.

The affidavit of Mr. Bestgen of the FHWA (Exhibit F-1, par. 17) states that the FHWA considers October 31, 1968 "to be the effective date of design approval for this project". However, the index to the Environmental Reevaluation prepared pursuant to the FHWA Draft Instructional Memorandum of November 24, 1970,

[14]

(Exhibit S-5, p. 9), states that the date of "effective design approval" was October 7, 1969, as does the letter from Mr. Bestgen to New York State Department of Transportation (NYSDOT) dated April 16, 1973, (Exhibit S-2, Appendix I). In addition, a letter of June 8, 1970, from the NYSDOT to the New York State Office of Planning Coordination (Exhibit F-1, Appendix XVIII), requesting State Clearing House Review of Section 5C, indicates that the requested review is a prerequisite to obtaining design approval from the USBPR and a letter from NYSDOT to FHWA dated February 2, 1971), (Exhibit F-1, Appendix XXIII), [1] states that the required Clearing House Review had been completed. If, in fact,

---

1 This letter, incidently, indicates that at that time the State did not anticipate using Federal funds for the construction of the bridge substructure (Section 5C), in which case, no EIS would have been required.

Clearing House Review was a prerequisite to design approval, it may well be that design approval prior to February 1, 1971, such as might obviate the need for an EIS, had not been secured. If those who were directly involved in the project were unsure as to the requirements of the law, it seems as likely that the average layman, such as the plaintiffs, being equally unsure, would in good faith rely on the advice given by

[15]
those implementing the law, that the law did not require an EIS. Thus, plaintiffs should not be charged with laches for that period from March 1972, when they may have inquired as to the EIS.

According to the plaintiffs, the granting of PS & E approval in May 1973 was not a matter of public knowledge and there was no publication of the fact that the bridge construction was a reality until June 1973, when the contract bids were advertised. Thereafter, the plaintiff Steubing and plaintiffs' attorney secured copies of the Environmental Reevaluation Supplemental Report (Exhibit S-6) and suit was commenced on November 23, 1973. None of the above indicates that there was such unconscionable delay on the part of the plaintiffs as to preclude them from attempting to prove their cause of action.

Defendants, of course, contend that because of the delay in commencement of the suit, they and others have been irreparably damaged. They allege that approximately $4.7 million has been expended on Section 5C from 1965 to date, including original planning, preliminary design, right of way acquisition, and construction to date (transcript pp. 39, 40). Of this sum, approximately $2.8 million was spent before May 1973, approximately $1 million was spent between May 1973 (PS & E approval)

[16]
and the commencement of this action, and approximately $1.9 million was spent from November 23, 1973, to the date of the hearing (transcript pp. 115, 116). They further allege that the projected cost of shutting down the job for seven months would be $1.8 million (transcript p. 86), and the cost of cancelling the present contract and reletting at a later date would be $2.8 million (transcript p. 91.). Many of the expenses were incurred before the Federal Government committed itself to the bridge in May 1973 and much expense was incurred after knowledge of the lawsuit, and thus could be deemed not material to the issue of laches.

The nature of the lawsuit should also be considered in determining whether laches should apply. In Monroe County v. Volpe, supra., the court stated (p. 699):

> "Congress directed that NEPA, which provided for an impact statement, was to be implemented to 'the fullest extent possible,' 42 U.S.C. §4332. In using this language, it was not creating a loophole to avoid compliance, but rather was stating that NEPA must be followed unless some existing law applicable to the agency made compliance impossible, Cong. Rep. No. 91-765, 91st Cong., 1st Sess., U.S. Code Cong. & Ad. News, pp. 2767, 2770 (1969). See also, Ely v. Velde, 451 F.2d 1130, 1138 (4 Cir. 1971). Calvert Cliffs', supra., 449 F.2d at 1114-1115.

[17]

> "This court has been rigorous in applying NEPA to Federal Power Commission decisions, even where hearings were held prior to the effective date, Scenic Hudson Preservation Conf. v. Federal Power Comm., 453 F.2d 463, 481 (2 Cir. 1971), cert. denied, 407 U.S. 926, 92 S.Ct. 2453, L.Ed.2d 813 (1972), and a project

was under construction but not licensed prior to the effective date, Greene, supra., 455 F2d at 424."

In I-291 Why? Association v. Burns, supra., Judge Blumenfeld, in discussing the question of laches as it relates to environmental litigation, stated at page 28 of his decision:

"It is at this point that plaintiff's special status as an essentially public interest litigant seeking to vindicate public rights under NEPA must be considered. Environmental litigation is complex and costly; even the decision when to seek counsel with a view toward litigation is difficult, since the posture of a public works project is inevitably obscured by the mists of bureaucracy. With few exceptions environmental action groups--especially those such as plaintiff organized in ad hoc response to a particular project--lack the resources affording access to legal advice in advance of a decision to litigate. The interests of the members of such groups are generally inchoate and decentralized until action is galvanized and funds are mobilized by some startling disclosure which awakens the public to the possibly dire consequences of an imminent intrusion on the environment. Yet dozens of cases have demonstrated

[18]

"that absent the advocacy of such groups, the procedural rights and protections enshrined in NEPA stand in jeopardy of being ignored with impunity."

In the case of City of New York v. U.S., 337 F.Supp.

150, (EDNY 1972), Judge Friendly, in commenting, among other matters, on plaintiff's delay in commencing its action until the eleventh hour, stated at page 160:

> "On the other hand, such considerations do not justify the Commission's disregard of the law. The tardiness of the parties in raising the issue cannot excuse compliance with NEPA; primary responsibility under the Act rests with the agency."

Defendants have cited not only the monies which may be lost if construction is delayed or abandoned but also the collateral injury which might be suffered by the New York State Education Department, Niagara Mohawk Corporation, and others who constructed various facilities in anticipation of the completion of the bridge, as well as the loss of employment to those who will work on the bridge. But the State Education Department school was built in 1970, long before final PS & E approval was granted. While there may well be damage to others, consideration must also be given to the possible detriment

[19]

to the environment and the Congressional intent in requiring compliance with the statute designed to protect the environment. And, while delay may result if the plaintiffs are allowed to proceed with their lawsuit, this does not necessarily mean that the bridge will never be built.

In Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Commission, 449 F.2d 1109 (D.C.Cir. 1971), the Court held that "considerations of administrative difficulty, delay, or economic cost will not suffice" to excuse compliance. In Greene County Planning Board v. Federal Power Commission, 455 F.2d 412, (CA 2 1972), cert. denied, 409 U.S.

849, the Court, in endorsing Calvert Cliffs', stated (p. 422):

> " . . . we can only add our voice to that of the District of Columbia Circuit in Calvert Cliffs': Delay is a concomitant of the implementation of the procedures prescribed by NEPA, and the spectre of a power crisis 'must not be used to create a blackout of environmental consideration in the agency review process'. (449 F. 2d at 1122.) 'It is far more consistent with the purposes of the Act to delay operation at a stage where real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible.' Id. at 1128."

[20]

In determining the applicability of laches in this case, it would seem that the actions and knowledge of the defendants should also be considered. For a number of years they were aware of the concern of these plaintiffs and others as to the effect of the bridge on the environment. On December 16, 1970, in a letter to the NYSDOT, the New York State Department of Environmental Conservation expressed concern about the bridge in stating:

> "First reaction from our field specialists indicates that construction of this project will cause serious adverse environmental impacts. The ecology of Chautauqua Lake could be disrupted both during and after construction, adversely affecting the recreational, esthetic, and economic resources of the immediate and surrounding area." (Exhibit S-5)

It may well be that all the fears of the State Department of Environmental Conservation were allayed as a result

of subsequent conferences and changes in construction plans prior to final approval and that the plans as finalized will have little or no effect on the environment. But, it would seem, in view of the Congressional mandate in the enactment of NEPA, that the Federal agencies would better have served the purpose of the law by requiring

[21]
preparation of an EIS prior to the grant of PS & E approval, regardless of the date of "design approval", particularly considering their knowledge of the state of the developing case law concerning the necessity of an EIS and the hazards involved in proceeding without an EIS. Monroe County v. Volpe, supra., decided in December 1972, held (p. 699):

> "This approval (PS & E approval) in the present case was not given prior to the effective date of NEPA, and, therefore, an impact statement must be prepared, ...", (citations omitted)

and the defendants must have been aware of the hazards involved in proceeding without an EIS, as evidenced by the memorandum from the FHWA to the NYSDOT under date of April 16, 1973, (three weeks prior to its grant of PS & E approval), which noted:

> "As you are aware, the procedures of PPM 90-1 have been recently challenged, and there is a very good possibility that Environmental Impact Statements may be required prior to P.S. & E. approvals for all projects in the near future." (Exhibit F-1, Appendix XXXI)

Considering all of the foregoing, it is the opinion of the undersigned that the plaintiffs are not guilty of such delay in the institution of this action as to constitute laches.

Report and Recommendation.

[22]

Equitable Considerations
Relating to the Appropriateness of
Granting a Preliminary Injunction or
Dismissing the Action

Before a Preliminary Injunction will be granted, there must be a showing of probable success on the merits as well as a showing of irreparable harm to those seeking the injunction. Gulf & Western Industries v. Great Atlantic & Pacific Tea Co., Inc., 476 F.2d 687 (CA 2 1973), Proetta, et al. v. Dent, et al., (CA 2 1973) 484 F.2d 1146.

A. The Probability of Success on the Merits

Admittedly, no EIS, as such, was prepared by any Federal agency. In 1971, an "Environmental Reevaluation" (Exhibit S-5) was prepared by the NYSDOT and approved by the FHWA. This document consists primarily of correspondence among the NYSDOT, its engineering consultants, and the FHWA, relative to the construction of the bridge, but also includes records of the fears raised by the State Department of Environmental Conservation and of conferences relative to environmental problems. In March 1973, the NYSDOT submitted an "Environmental Reevaluation Supplemental Report" (Exhibit S-6), and this document was approved by the FHWA on April 16, 1973. It deals with engineering aspects as well as the socio-economical and environmental impact of the bridge.

[23]

The pertinent section of NEPA relating to the necessity of an EIS is Section 102 (42 U.S.C. §4332) which states in part as follows:

> "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies,

regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall . . . ."

. . . .

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action;

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

[24]

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local

> agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes:" (emphasis supplied)

In Greene County Planning Board v. Federal Power Commission, supra., the court held that the "primary and nondelegable responsibility" for fulfilling the function of Section 102(2)(C) lay with the Federal agency and that:

> "The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of (the State agency) for its own." (455 F. 2d at p. 420)

See also Conservation Society v. Secretary of Transportation, 5 ERC 1683 (Dist. Vt., July 26, 1973) and I-219 Why? Association v. Burns, supra., at page 49 of the courts decision. Furthermore, there is nothing in the record

[25]

of this hearing to indicate that the required Federal interagency consultation relative to environmental impact was had or that the other requirements of Section 102(C) were met.

As to the defendants' allegation that an EIS was not required because of "design approval" before February 1, 1971, as previously stated, there is a serious question as to whether "design approval" was in fact granted before February 1, 1971. Even if such were to be conceded, the Monroe County v. Volpe case, supra., would require an EIS on any project wherein PS & E approval was not given prior to the effective date of

NEPA. In Arlington Coalition v. Volpe, (CA 4 1972) 458 F.2d 1323, 3 ERC 1995, the court held that the requirements of Section 102(C) would be applicable to a project in progress on the effective date of NEPA until that stage of progress had been reached where:

> " . . . the costs of altering or abandoning the project could so definitely outweigh whatever benefits that might accrue therefrom that it might no longer be 'possible' to change the project in accordance with Section 102." (p. 1331)

[26]

The court further stated at page 1332:

> "Manifestly the date of design approval alone does not accurately measure whether Arlington I-66 has reached the crucial stage, and determining the applicability of Section 102(C) by this standard alone would be arbitrary and capricious agency action and an abuse of administrative discretion."

It thus seems reasonable to believe that based on the record herein there has been a showing of probable success on the part of the plaintiff.

B. The Showing of Irreparable Harm

At the time of the hearing, according to the testimony, one test piling of a contemplated 250 pilings had been driven and the construction of the bridge substructure contract was approximately 3 percent complete.

If no injunction were to issue, it is reasonable to assume that by the time a final determination of the issues on their merits has been made, the construction will have reached that stage of completion wherein for economic reasons, it would be impossible to turn back

or alter the work and thus the environment might be irreparably affected. The State Department of Fnvironmental Conservation expressed this fear in its letter of December 16, 1970, (Exhibit S-5), when it stated: "The ecology of Chautauqua Lake could be disrupted both during and after construction . . . ."

[27]

As has been stated by the attorneys for the parties, the issue in this lawsuit is not whether the bridge should be built, but instead, whether there has been proper compliance with the procedural requirements of NEPA. The determination as to completion of the bridge is to be made by the appropriate State and Federal agencies, in compliance with the law and, if it is determined that an EIS is required, upon a weighing of all the factors raised by that statement, including the economic needs as well as the environmental requirements of the public. It may well be that upon completion of the EIS the responsible agencies will be fully satisfied that the environment is being protected and that the bridge should proceed to completion as planned. But it would better serve the public if that protection were assured prior to continuation of construction, when possible changes in protection of the environment can be accomplished.

It is thus recommended that plaintiffs' motion for a preliminary injunction be granted, pending a trial of the merits of this case.

At a post hearing conference attended by counsel for all parties, the attorney for the State of New York

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advised the monetary loss which might be caused to the State by any interruption of work would be considerably lessened if the five required test pilings were completed prior to a work stoppage, so that the results of such tests could be analyzed during the stoppage. He further

indicated that if the bridge were not completed, these pilings could be eliminated with little or no detriment to the environment. If a preliminary injunction is to be granted, it is suggested that it be effective upon the completion of the driving of the five test pilings, lacking any reasonable showing by plaintiffs of environmental damage.

Conclusions of Law

1. There has been no showing of unconscionable delay on the part of the plaintiffs, or such prejudice to the defendants, as to constitute laches.

2. The defense of laches should not apply in this action.

Respectfully submitted.

(Signed) Edmund F. Maxwell
Edmund F. Maxwell
United States Magistrate

Dated: Buffalo, New York
April 9, 1974

NOTICE OF MOTION TO CONFIRM REPORT OF SPECIAL MASTER AND ENTER PRELIMINARY INJUNCTION.

(SAME TITLE).

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of RICHARD J. LIPPES, Esq., sworn to the 16th day of April, 1974, plaintiffs move this Court at the United States Courthouse, Part I thereof on the 22nd day of April, 1974 at 11:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order confirming the report and recommendation of Edmund F. Maxwell, United States Magistrate, sitting as a Special master, and to enter a preliminary injunction according to such recommendations.

s/ RICHARD J. LIPPES
RICHARD J. LIPPES
Attorney for Plaintiffs
Office & P. O. Address
800 Western Building
Buffalo, New York 14202

TO: Douglas Dales
Asst. Atty. General
State of New York
Justice Bldg.
Albany, New York 12224

C. Donald O'Connor
United States Attorney
U.S. Courthouse
Buffalo, New York 14202

AFFIDAVIT OF RICHARD J. LIPPES IN SUPPORT OF MOTION.

(SAME TITLE).

STATE OF NEW YORK :
COUNTY OF ERIE : s.s.
CITY OF BUFFALO :

RICHARD J. LIPPES, being duly sworn, deposes and says:

1. That he is the attorney representing the Plaintiffs in the above entitled action and makes this affidavit in support of the motion herein seeking the relief indicated in the moving papers.

2. That on April 9, 1974, Edmund F. Maxwell, United States Magistrate, acting as Special master, filed a recommendation and report finding that the defense of laches raised by defendants should not apply and that a preliminary injunction should be granted.

WHEREFORE, deponent respectfully prays that the Court confirm the report of the Special master pursuant to Rule 54(e)(2) of the Federal Rule of Civil Procedure and grant the relief requested in the moving papers.

s/ RICHARD J. LIPPES

(Sworn to April 16, 1974).

MOTION TO OBJECT TO REPORT.

(SAME TITLE).

Defendant, Raymond T. Schuler, moves the Court to reject the Report and Recommendation of United States Magistrate Edmund F. Maxwell, dated April 9, 1974, in the specific respects set forth in the affidavit of Douglas S. Dales, Jr., based upon all the papers and proceedings heretofore had herein. The above motion will be made at the United States Courthouse, Buffalo, New York, before Honorable John T. Curtin, United States District Judge, on April 22, 1974, pursuant to notice by the Clerk, dated April 10, 1974.

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Defendant Schuler
Office and P. O. Address
The Capitol
Albany, New York 12224

By: s/ Douglas S. Dales, Jr.
Douglas S. Dales, Jr.
Assistant Attorney General

TO:

RICHARD J. LIPPES, ESQ.
Attorney for Plaintiffs
Office and P. O. Address
800 Western Building
Buffalo, New York 14202

JOHN T. ELFVIN, ESQ.
United States Attorney, in and for
the Western District of New York
Attorney for Defendant Brinegar
Office and P. O. Address
502 United States Courthouse
Buffalo, New York 14202

AFFIDAVIT OF DOUGLAS S. DALES, JR.

(SAME TITLE).

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

DOUGLAS S. DALES, JR., being duly sworn, deposes and says:

I am an Assistant Attorney General of the State of New York. I was assigned to the defense of this litigation at the outset and am familiar with the facts and circumstances herein. I make this affidavit in opposition to the confirmation of the Report and Recommendation submitted by United States Magistrate Edmund F. Maxwell in the specific respects hereinafter set forth.

Attached hereto and made a part hereof as Appendix "A" is a copy of proposed Findings of Fact and Conclusions of Law submitted jointly by the State and Federal defendants to Magistrate Maxwell. The defendant Schuler respectfully objects to the Magistrate's failure to find, as proposed, in his Report and Recommendation the following numbered findings of fact and conclusions of law:

Findings of Fact - "2", "12" - "14", "16", "17", "19", "27", "28", "32"- "38", "41" - "48", "50", "52" - "60", "62" - "93".

Conclusions of Law - "I" - "X".

Additionally, the defendant Schuler respectfully objects to the following statements contained in the Report and Recommendation at the pages indicated:

1. Page 11 - "...Thus, in making a determination in this case, only those facts relating to the construction of Section 5C are being considered."

2. Page 12 - "Thus, if the defendant Federal Government could have withdrawn its support as late as May 1973, it does not seem reasonable to hold that the plaintiffs should be charged with delay for failing to bring action within the year before such commitment."

3. Page 13 - "While plaintiff Steubing had been advised by the State defendant in 1972 that an EIS was not required under the law (transcript p. 299), that fact should not accrue to the benefit of the defendants in this action which seeks a determination as to whether the EIS is actually required."

4. Page 15 - "...Thus, plaintiffs should not be charged with laches for that period from March 1972, when they may have inquired as to the EIS."

5. Page 15 - "...None of the above indicates that there was such unconscionable delay on the part of the plaintiffs as to preclude them from attempting to prove their cause of action."

6. Page 16 - "...Many of the expenses were incurred before the Federal Government committed itself to the bridge in May 1973 and much expense was incurred after knowledge of the lawsuit, and thus could be deemed not material to the issue of laches."

7. Page 21 - "Considering all of the foregoing, it is the opinion of the undersigned that the plaintiffs are not guilty of such delay in the institution of this action as to constitute laches.

8. Page 26 - "It thus seems reasonable to believe that based on the record herein there has been a showing of probable success on the part of the plaintiff."

9. Page 27 - "It is thus recommended that plaintiffs' motion for a preliminary injunction be granted, pending a trial of the merits of this case."

10. Page 28 - "Conclusions of Law

1. There has been no showing of unconscionable delay on the part of plaintiffs, or such prejudice to the defendants, as to constitute laches.

2. The defense of laches should not apply in this action."

Attached hereto and made a part hereof as Appendix "B" is the affidavit of William C. Hennessy, Assistant Commissioner for Transportation Operations for the New York State Department of Transportation, which sets forth the Department's position with respect to winding down the Chautauqua Lake bridge project should the Court grant a preliminary injunction. Included therein are specific construction needs which are deemed essential by the Department to protect the public and the environment if the project is to be halted.

WHEREFORE, it is respectfully requested that the Court adopt the above specific objections to the Report and Recommendation of the United States Magistrate and deny the preliminary injunction. Should the Court grant a preliminary injunction, it is respectfully requested that the recommendations contained in Appendix "B" be adopted.

s/ Douglas S. Dales, Jr.
Douglas S. Dales, Jr.

(Sworn to April 19, 1974).

APPENDIX A — Proposed Findings of Fact and Conclusions of Law.

[The Proposed Findings of Fact and Conclusions of Law attached hereto is the same as printed herein infra at page 110a.]

APPENDIX B — Affidavit of William C. Hennessy.

(SAME TITLE).

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

WILLIAM C. HENNESSY, being duly sworn, deposes and says:

I am Assistant Commissioner for Transportation Operations for the New York State Department of Transportation. I make this affidavit for the purpose of expressing the position of this Department in view of the possibility that plaintiffs' motion for preliminary injunction in this matter may be granted.

The Report and Recommendation submitted by U. S. Magistrate Edmund F. Maxwell recommends rejection of the defense of laches and further recommends that plaintiffs' motion for preliminary injunction be granted. Should the Court accept these recommendations, the alternatives available include discontinuance of all construction operations and/or discontinuance of further federal funding on this project. On behalf of the Department of Transportation, the Court is respectfully urged to consider the physical condition of the project site if the granting of plaintiffs' preliminary injunction is being contemplated. The Department submits that

certain construction is absolutely essential for the public welfare and safety, for the protection of work heretofore performed, for the protection of surrounding real property, for the prevention of environmental damage, for the re-establishment of all local services and for the orderly suspension or termination of construction operations. In connection with these areas of concern, we respectfully request that, notwithstanding the imposition of an injunction, the Court permit such construction to continue with federal financing.

The following is a list, as provided me by DOT regional construction personnel, of the specific construction needs within the project area:

Stow side

1. Backfill west abutment and pier excavations.

2. Clear Ball Creek Channel.

3. Dismantle pile racks and stiffleg derrick, remove foundations, and cut off H-piles flush with ground.

4. Shape, topsoil if necessary, and seed all disturbed areas.

5. Grade and seed Sec. 5B disposal area.

6. Correct and/or construct necessary drainage.

7. Pour concrete into tube piles previously driven in Pier 1.

Chautauqua Lake

8. Cut off tubular concrete piles at mudline or provide navigational warnings during the suspension of construction.

Bemus Point Area

9. Complete Bridge No. 5.

Appendix B — Affidavit of William C. Hennessy.

10. Complete Service Road from Main & Lakeview to Bemus Creek Road, and provide necessary drainage.

11. Repave Bemus Creek Road from Main Street to approximately 150 feet south of Service Road and provide drainage.

12. Re-establish driveways as necessary.

13. Remove dredge discharge pipe, and patch crossings at Main Street and Barton Avenue.

14. Repave Ralph Avenue from Main Street to Williams Street and repair drainage structures.

15. Backfill Shear Key "C".

16. Grade and seed Road A, install necessary drainage.

17. Repair shoulders along Main Street, from Ralph Avenue to Sec. 5D.

18. Correct and/or construct necessary drainage.

19. Grade, topsoil if necessary, and seed along Mainline and ramps from the Lake to Sec. 5D.

We estimate a period of approximately 10 to 12 weeks necessary for completion of the above operations.

The Court should be advised that as an alternative to the completion of Bridge No. 5 and the completion of the service road (Items 9 and 10 above), the Department is considering the advisability of re-establishing Popal Lane. If it is determined to do so, the estimate of time necessary to complete these essential construction operations would be reduced by several weeks. Our basic concern in this regard is to provide the most satisfactory traffic flow within the community and the most satisfactory accessibility of residential areas to emergency vehicles. Our study of this situation is current and a determination will be reached in the immediate future.

Appendix B — Affidavit of William C. Hennessy.

Should explanation of the above operations be required, DOT regional engineering personnel will be present before the Court at the time of this hearing for that purpose.

The prospect of discontinuing construction of the Chautauqua Lake bridge project, in view of the great expenditures of time and money to date, is an unfortunate development for this Department, and we respectfully submit that the Recommendation and Report should be rejected by this Court. Should it be determined, however, that the Report will be confirmed, we believe that recognition by the Court of the above construction needs would be a proper exercise of judicial discretion. Indeed, should we be required to leave the project site in its present physical condition, the local residents would be subjected to serious disruption of services, health and safety hazards, and unsightly conditions for what may be an extended period of time.

s/ W. C. HENNESSY
WILLIAM C. HENNESSY

(Sworn to April 19, 1974).

OBJECTIONS TO REPORT OF SPECIAL MASTER.

(SAME TITLE).

The defendant, Claude S. Brinegar, as Secretary of Transportation of the United States of America, by John T. Elfvin, United States Attorney in and for the Western District of New York, respectfully shows to the Court and makes the following objections to the report of Edmund F. Maxwell, United States Magistrate, sitting as a Special Master:

1. That this matter was referred by stipulation dated January 14, 1974 and order dated January 17, 1974 to United States Magistrate Maxwell, as Special Master, "to hear and report with all due dispatch, the facts of this matter concerning the issue of laches and/or delay and the equitable considerations in connection therewith as they relate to the appropriateness of granting a preliminary injunction or dismissing the action."

2. That Magistrate Maxwell made and filed his report on April 9, 1974 and a copy thereof was received by the United States Attorney on April 11, 1974.

3. That the defendant, Brinegar, objects to said report because said report exceeds the scope of the reference in that it deals with the probability of success on the merits of plaintiff's suit, an issue which was not litigated before him, and which was erroneously decided because of valid defenses raised in defendant's answer.

4. That the defendant, Brinegar, further objects to said report because said report does not make specific findings as to major areas of evidence that was substantially uncontroverted and is relevant to the issue of laches, such as the acts of private parties and the public to their detriment in reliance upon the progress of the planning and construction of the subject bridge. Magistrate Maxwell made passing reference in his report to the acts of Niagara Mohawk Power Corporation, and no findings or mention

whatsoever as to the Peek 'N' Peak ski resort and the investments of the corporation that owns it, of the parties that loaned money to it, and the members of the public that bought stock in it. Magistrate Maxwell also does not deal with the effect of the planning by various communities and governmental units, which assumes the completion of said bridge, upon the potential actions of the public in reliance upon the continued construction of said bridge.

5. That the defendant, Brinegar, further objects to said report because Magistrate Maxwell erroneously fixed the time at which the United States was committed to the particular project by a casual reliance upon a conclusion of fact expressed by the witness Bestgen, and upon a mis-reading of 23 U.S.C., §106(a).

6. That the defendant, Brinegar, further objects to said report because Magistrate Maxwell erroneously, as appears by his report at page 11, considered only the evidence as to laches as to the degree of construction and expenses as to Section 5-C, the subject bridge, rather than consider all construction and expense relating to the Southern Tier Expressway.

7. That the defendant, Brinegar, further objects to said report because Magistrate Maxwell erroneously exceeded the scope of his reference by reporting and making conclusions of law.

8. That the defendant, Brinegar, further objects to said report because Magistrate Maxwell erroneously failed to find the facts as submitted and set forth in the proposed findings of fact presented by the defendants.

WHEREFORE, the defendant, Brinegar, moves this Court that said report be rejected and that this matter be recommitted to Magistrate Maxwell to prepare specific and proper findings of fact on the issues referred to him.

Objections to Report of Special Master.

DATED: Buffalo, New York, April 19, 1974

JOHN T. ELFVIN
United States Attorney in and for
the Western District of New York
Attorney for Claude S. Brinegar,
Secretary, Department of Transport.
Office and P. O. Address
502 U. S. Courthouse
Buffalo, New York 14202

By: /s/ C. Donald O'Connor
C. DONALD O'CONNOR
Assistant United States Attorney

DEFENDANTS' PROPOSED FINDINGS OF FACT.

(SAME TITLE).

Defendants request the Court to make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The general route of the Southern Tier Expressway, as defined by Highway Law, §340-C, in 1962, runs from the Broome-Tioga County Line westerly to the Pennsylvania State Line, in the area of Erie, Pennsylvania.

2. The sections at issue in Chautauqua County are designated as follows, running from west to east:

a) "5A" - Pennsylvania State Line to Sherman, 9.0 miles;

b) "5B" - Sherman to Stow, 10.0 miles;

c) "5C" - Stow to Bemus Point, 1.4 miles;

d) "5D" - Bemus Point to Strunk Road, 6.1 miles.

3. Section "5C" includes a bridge spanning Chautauqua Lake from Stow to Bemus Point, which concept was approved by the Bureau of Public Roads (BPR) on August 17, 1965 (S.M. 13; Exhibit S-2, Appendix "B").

4. On October 14, 1965, BPR approved the Preliminary Location Plans and authorized the inclusion of the bridge as part of the presentation to be made at a hearing on November 23, 1965, at the Jamestown Community College (S.M. 13, 14; Exhibit S-2, Appendix "A").

5. Prior to the hearing's being held, advertisements were placed in the Jamestown Journal on November 12 and 19, 1965 (S.M. 14).

6. The public hearing was held on November 23, 1965, at the Jamestown Community College and the minutes thereof transcribed (S.M. 14; Exhibit S-3).

Defendants' Proposed Findings of Fact.

7. At the public hearing, twenty-five persons made oral statements (S.M. 15; Exhibit S-3).

8. At the hearing, two sets of maps were presented to the audience, one showing the project in a 1" = 2,000' scale (S.M. 16; Exhibit S-4a) and the other showing the project in more detail in a 1" - 200' scale (S.M. 16; Exhibit S-4b). Both maps show a proposed bridge across Chautauqua Lake (S.M. 16, 17).

9. On February 21, 1966, BPR approved the transcript of the public hearing, Exhibit S-3, as satisfying the requirements of Policy and Procedure Memorandum (PPM) 20-8 (S.M. 17; Exhibit S-2, Appendix "C").

10. On March 9, 1966, the Appalachian Regional Commission designated the Southern Tier Expressway for inclusion in the Appalachian Regional Development Act highway program (S.M. 18, 19).

11. The primary objective of the Appalachian Regional Development Act highway program is to promote the economic development of areas found by Congress to be significantly underdeveloped (S.M. 213; 40 U.S.C., App., §2).

12. The Appalachian Regional Commission's approval of the corridor included the bridge spanning Chautauqua Lake (S.M. 214-222; Exhibits S-19; S-20a; S-20b; S-21).

13. Pursuant to the Appalachian Regional Development Act, 40 U.S.C., App., §201, the Secretary of Transportation is authorized and empowered to assist in the construction of Appalachian Regional Development Act highway programs, the provisions of Title 23 U.S.C. being made applicable thereto.

14. On May 31, 1966, authorization was obtained from BPR to prepare preliminary design plans on Section 5C (S.M. 18; Exhibit S-2, Appendix "D"; Exhibit F-1, para. 11, IX).

Defendants' Proposed Findings of Fact.

15. On May 3, 1967, the Federal Highway Administration (FHWA), formerly BPR, approved the present location of the bridge (S. M. 20; Exhibit S-2, Appendix "E"; Exhibit F-1, para. 15, XIII).

16. Design approval for Section 5C was given by FHWA on October 31, 1968 (S. M. 276, 277; Exhibit F-1, para. 17).

17. On July 16, 1969, FHWA determined that all applicable requirements of PPM 20-8, relating to public hearings, had been satisfied and that no further hearings were required (Exhibit F-1, para. 18, XV).

18. On March 30, 1970, FHWA authorized the New York State Department of Transportation (NYDOT) to proceed with the acquisition of right of way in connection with Section "5C" (Exhibit F-1, para. 20, XVII).

19. Right of way acquisition began on Section "5A" in August 1968; on Section "5B" in August 1969; on Section "5C" in October 1969; and on Section "5D" in January 1969 (S. M. 55, 56).

20. On September 23, 1971, FHWA approved an environmental reevaluation of Section "5C", advising NYDOT that no further environmental action would be required, in accordance with FHWA Draft Instructional Memorandum, dated November 24, 1970, and FHWA NEPA guidelines, dated November 30, 1970, which preceded FHWA's PPM 90-1, issued on August 24, 1971 (S. M. 20, 21; Exhibits S-2, Appendix "H"; F-1, para. 29, XXIV, XXVI; S-5).

21. On May 24, 1972, FHWA granted PS&E approval for two demolition contracts encompassing Sections "5B", "5C" and "5D" (S. M. 59; Exhibit F-1, para. 31, XXVIII).

Defendants' Proposed Findings of Fact.

22. Contracts were awarded for demolition of buildings in connection with Sections "5B", "5C" and "5D" in June 1972 and the work completed by August 25, 1972 (S.M. 59; Exhibits S-10A, S-10B).

23. On April 16, 1973, FHWA approved a supplemental reevaluation of Project "5C" (S.M. 22; Exhibits S-2, Appendix "I"; S-6; F-1, para. 33, 34).

24. Construction of the bridge was planned in three phases, demolition of structures within the approaches on either side of the lake, completed by August 25, 1972, construction of the substructure and construction of the superstructure (S.M. 22-24).

25. On May 9, 1973, FHWA granted PS&E approval for construction of the bridge substructure (S.M. 28; Exhibit S-2, Appendix "J").

26. On July 9, 1973, a contract was awarded to Raymond International, Inc., for construction of the bridge substructure (S.M. 27, 28; Exhibit S-2).

27. At the hearing held January 17 and 18, 1974, Donald H. Ketchum, Region 5 Director, NYDOT, testified to the following State expenditures on the Southern Tier Expressway to date (S.M. 29-36):

	Region 5	Region 6	Total
Preliminary Engineering	$ 9.3 m.	$ 13.7 m.	$ 23.0 m.
Construction Costs	156.0 m.	228.0 m.	384.0 m.
Right of Way Costs	23.4 m.	34.2 m.	57.6 m.
Totals	$188.7 m.	$275.9 m.	$464.6 m.

28. At the hearing held January 17 and 18, 1974, Donald H. Ketchum, Region 5 Director, NYDOT, testified to the following State expenditures on Sections "5A", "5B", "5C" and "5D" to date (S.M. 36-43):

Section "5A" -	$15.0 m.
Section "5B" -	1.5 m.
Section "5C" -	4.7 m.
Section "5D" -	1.3 m.
Total	$22.5 m.

29. From July 9, 1964 to December 7, 1972, there were approximately twenty informal meetings with interested individuals and groups in connection with Section "5C" (S.M. 43-46; Exhibit S-7).

30. Plaintiff Steubing attended some of the informal meetings contained in Exhibit S-7.

31. From February 1966 to December 1973, at least seventy-five newspaper articles were printed in connection with Section "5C" (S.M. 46-50; Exhibit S-7).

32. The newspaper articles contained in Exhibit S-7 appeared in the Dunkirk Evening Observer, the Buffalo Courier Express, the West Olean Times Herald, the Jamestown Post Journal, the Grape Belt, the Tonawanda News and the Salamanca Republican Press (S.M. 47).

33. At least two of the newspaper articles contained in Exhibit S-7 were written by plaintiff Jack Lloyd (S.M. 47).

34. The newspaper article by plaintiff Jack Lloyd dated April 4, 1972 describes the fact that NYDOT had prepared a reevaluation of the Section "5C" project in lieu of an environmental impact statement, which procedure had been accepted by FHWA (S.M. 48; Exhibit S-7, p. 69).

35. On August 21, 1972, three of the named plaintiffs sponsored a full page advertisement which ran in at least one local newspaper, the Dunkirk Evening Observor, entitled "Stop the Bridge to Nowhere" (S.M. 49; Exhibit S-8).

Defendants' Proposed Findings of Fact.

36. On November 18 and 25, 1965, NYDOT published legal notices in two newspapers announcing the opportunity for public hearings in connection with Sections "5A" and "5B", as required by FHWA procedures (S.M. 50-52).

37. No requests for a public hearing were received in connection with Sections "5A" and "5B" (S.M. 52; Exhibit S-9).

38. The State acquired the following parcels of property for right of way purposes (S.M. 58, 59):

Section	Parcels	Buildings	Families Affected	Business Affected
"5A"	38	14	5	0
"5B"	95	96	22	1
"5C"	63	59	20	1
"5D"	142	79	24	4
Total	338	248	71	6

39. There were 43 buildings removed on the west side of Chautauqua Lake in the area of the bridge approach in connection with the demolition contract referred to as Exhibit S-10A (S.M. 60).

40. There were 30 buildings demolished on the east side of Chautauqua Lake in the area of the bridge approach in connection with the demolition contract referred to as Exhibit S-10B (S.M. 61, 62).

41. There were a total of 244 structures demolished within the State's right of way, including the 73 structures razed under the two demolition contracts, the remaining structures having been removed with State forces (S.M. 62, 63).

42. The bulk of the buildings removed were shoreline properties visible from the lake and from the mainland (S.M. 65, 66).

Defendants' Proposed Findings of Fact.

43. NYDOT maintained a relocation assistance office opposite Bemus Point from December 1970 to March 1973 with a prominent sign on the building (S. M. 66).

44. Exhibits S-11 and S-12 contain correspondence requesting information from NYDOT and the New York State Department of Environmental Conservation (ENCON) with respect to environmental impact statements in connection with Section "5C" and the responses thereto during the period from March 17, 1966 through March 11, 1972 (S. M. 67-70).

45. The correspondence contained in Exhibits S-11 and S-12 includes requests for information by plaintiffs Chautauqua County Federation of Sportsmen, Inc., and Chautauqua County Environmental Defense Council (S. M. 67-70).

46. Plaintiffs Steubing and Chautauqua County Environmental Defense Council began investigating the background involving Section "5C" in 1970 (S. M. 288, 289).

47. One of the first steps taken by plaintiffs Steubing and Environmental Defense Council was to examine plans of the project in the office of the Chautauqua County Planner (S. M. 289).

48. Plaintiff Steubing requested meetings with NYDOT personnel in March 1972 to discuss environmental factors, at which meetings the NYDOT representatives discussed with concerned citizens the status of the project, the cost, the need for an environmental impact statement and the steps to be taken to prohibit ecological damage (S. M. 290, 291).

49. Plaintiff Steubing was specifically advised in March 1972 by NYDOT officials that the State had been required by FHWA to prepare an environmental reevaluation (Exhibit S-5) for Section "5C", in lieu of an environmental impact statement (S. M. 293, 299).

Defendants' Proposed Findings of Fact.

50. Plaintiff Steubing was familiar with the meaning of the term "environmental impact statement" from his meetings with other environmental groups (S. M. 298).

51. Plaintiffs knew in March 1972 NYDOT's and FHWA's view with respect to an environmental reevaluation's satisfying the requirements of NEPA in lieu of an environmental impact statement (S. M. 299, 300).

52. Plaintiffs were informed by the Environmental Protection Agency (EPA) in June 1972 that an environmental reevaluation had been prepared in late 1971 by NYDOT as an FHWA requirement and that the outcome of the reevaluation was a determination that the environment would be adequately protected, thus requiring no environmental impact statement (Exhibits F-2; F-3).

53. Since notice to the State on November 30, 1973 of the commencement of this litigation, NYDOT has taken steps to curtail the work of the contractor on Section "5C" to the extent possible without causing damage to the environment or creating hazardous conditions (S. M. 71-79).

54. At the request of the Attorney General's office, NYDOT prepared an estimate of the cost to the State of delaying the construction on Section "5C" from December 1, 1973 to June 1, 1974, a period of seven months (S. M. 80-85).

55. The estimated cost to the State of delaying the construction for seven months from December 1, 1973 is (S. M. 85, 86):

Project maintenance and overhead	$ 265,000
*Escalation cost of labor	285,000
" " " materials, expenses and combustibles	270,000
" " " equipment rental	90,000
Impact cost - Additional 7 mos. rental	440,000
Extra shut down	45,000
Extra start up	25,000
Subcontractor's additional expenses	460,000
Total	$1,880,000

*Escalation estimated at 1% per month.

Above figures based on equipment staying on project site.

56. At the request of the Attorney General's office, NYDOT prepared an estimate of the cost to the State if the contract on Section "5C" were cancelled and subsequently relet (S.M. 86-88).

57. The estimated cost to the State if the contract on Section "5C" were cancelled and subsequently relet is as follows (S.M. 89-91):

Item		
1 MX	Mobilization	$ 420,000
6 M	Marine Transportation	1,000
76	Maintenance of traffic	39,000
87 PS	Equipment for driving tubular piles .	1,875,000
87 X	Equipment for driving piles	13,000
116 SX	Project survey	80,000
	Site restoration	50,000
	Piling on hand	366,000
		$2,884,000
	Plus cost escalation - 15% per year on total contract cost (1 year)	225,000
	Total	$3,069,000

Defendants' Proposed Findings of Fact.

58. There is an additional internal cost to the State of approximately $20,000 to $30,000 for advertising and reletting the contract (S. M. 91).

59. At the request of the Attorney General's office, NYDOT prepared an estimate of the cost to the State of abandoning that portion of the Southern Tier Expressway from the Pennsylvania State Line to Bemus Point (S. M. 91-93).

60. The estimated cost to the State of abandoning that portion of the Southern Tier Expressway from the Pennsylvania State Line to Bemus Point is as follows: (S. M. 93-95):

PRELIMINARY ENGINEERING		
Section 5A	-	600,000
Section 5B	-	700,000
Section 5C	-	700,000
R.O.W. ACQUISITION		
Section 5A	-	270,000
Section 5B	-	660,000
Section 5C	-	580,000
COMPLETED UTILITY RELOCATIONS		
Section 5A	-	200,000
BUILDING DEMOLITION		
Section 5B	-	20,000
Section 5C	-	7,000
COMPLETED CONSTRUCTION		
Section 5A	-	14,750,000
Section 5B	-	2,900,000
SHUTDOWN COST - Section 5C		
Site Restoration		50,000
Materials on Hand		400,000
Settlement of Sub-contract & Supplier Claims		500,000
Balance Due on Pile Equipment Items		630,000
TOTAL		22,967,000

Defendants' Proposed Findings of Fact.

61. All physical changes to the environment, such as removal of trees and buildings, have already been effected in connection with Section "5C" on both sides of the lake (S. M. 98, 99).

62. Since August 1973, the contractor has employed the following average number of men per day (S. M. 95, 96):

August 1973	-	27
September 1973	-	38
October 1973	-	58
November 1973	-	46
December 1973	-	44

63. It is estimated that the contractor will employ an average of 160 men per day beginning in June 1974 (S. M. 96).

64. Richard G. Chaffee, Business Manager for Operating Engineers Local 17, testified to the estimated lost payroll that would result to members of that union were the Section "5C" and "5D" projects to be halted (S. M. 139-146).

65. Mr. Chaffee estimated for his union an average weekly payroll of $20,000 on Section "5C" during the peak construction seasons (S. M. 142).

66. Mr. Chaffee estimated for his union an average weekly payroll of $114,000 on Section "5D" during the peak construction seasons (S. M. 146).

67. A BOCES school was erected in 1969 on the Stow side of Chautauqua Lake in reliance on the anticipated completion of the bridge spanning the lake from Stow to Bemus Point (S. M. 96-98; Exhibit S-13).

68. Niagara Mohawk Power Corporation has begun construction of a service center facility at Stow at a cost of $400,000, in reliance on the anticipated completion

of the bridge spanning Chautauqua Lake from Stow to Bemus Point (S. M. 152-167).

69. Niagara Mohawk Power Corporation contracted to sell a portion of its old service center in Falconer to the municipal electrical company in Jamestown in reliance on the eventual completion of Section "5C" (S. M. 162, 163).

70. Peek'n Peak Recreation, Inc., operator of a ski area in the Town of French Creek, in Chautauqua County, after a feasibility study undertaken in 1970 and 1971 costing between $80,000 and $100,000, raised $1.5 m. by a public offering of its stock and $2.5 m. by commercial bank loans in order to embark upon an expansion program (S. M. 227-234).

71. The stock sale initiated by Peek'n Peak Recreation, Inc., was accompanied by a prospectus, approved by the Securities & Exchange Commission, showing, by way of a map included therein, the Southern Tier Expressway and the Chautauqua Lake Bridge (S. M. 233-236).

72. The anticipated completion of the Southern Tier Expressway and the Chautauqua Lake Bridge was the primary factor in the expansion program undertaken by Peek'n Peak (S. M. 235-237).

73. The capital raised by stock sale and bank loan has been used to construct a sewer plant, a water distribution system, an 18 hole golf course, two indoor tennis courts, an indoor swimming pool, sauna and exercise facilities, and a 600 room inn with dining facilities, lounges and convention rooms, which have been open since October 1, 1973 (S. M. 237, 238).

74. The success of the Peek'n Peak expansion facilities is dependent upon the completion of the Southern Tier Expressway and the Chautauqua Lake Bridge (S. M. 238, 244, 246).

Defendants' Proposed Findings of Fact.

75. Peek'n Peak has purchased an additional 800 acres of land in anticipation of additional expansion of its facilities to create a year round recreational center (S. M. 240, 241).

76. The Urban Area Planning Board of Southern Chautauqua County, in conjunction with the Chautauqua County Planning Board, developed comprehensive plans for the region and for each of the fourteen participating municipalities, beginning in 1966 and culminating in 1971 (S. M. 172-188; Exhibits S-14a; S-14b; S-15a; S-15b; S-16a; S-16b).

77. The Southern Tier Expressway, generally, and the Chautauqua Lake Bridge, particularly, were the critical elements in the planning for the comprehensive plans promulgated by the Urban Area Planning Board of Southern Chautauqua County (S. M. 179).

78. Copies of the comprehensive plans promulgated by the Urban Area Planning Board were available for public inspection (S. M. 181, 187).

79. The meetings of the Urban Area Planning Board and of the individual municipal planning boards were open to the public (S. M. 190, 195).

80. The Urban Area Planning Board promulgated in July 1970 a report entitled "Chautauqua Lake Study", predicated upon the eventual construction of the Southern Tier Expressway and the Chautauqua Lake Bridge (S. M. 188-192; Exhibit S-17).

81. The "Chautauqua Lake Study" was distributed publicly and was available for public inspection (S. M. 192).

82. NYDOT published a report, in October 1970, entitled "Jamestown Transportation Study", based upon input from NYDOT sources and the Urban Area Planning Board. The report includes the Chautauqua Lake Bridge concept (S. M. 192-194; Exhibit S-18).

Defendants' Proposed Findings of Fact.

83. The "Jamestown Transportation Study" was available for public inspection (S.M. 194).

84. The Chautauqua County Legislature, by resolution dated November 8, 1972, after debate, endorsed the completion of the Southern Tier Expressway, including the bridge spanning Chautauqua Lake (S.M. 197, 198; Exhibit S-2, Appendix "K").

85. In January 1968, the New York State Office of Planning Services (OPS) published the "New York State Appalachian Program Development Plan", as required by the Appalachian Regional Development Act, 40 U.S.C., App. (S.M. 212; Exhibit S-19).

86. Exhibit S-19 includes a map showing the Southern Tier Expressway corridor and the bridge spanning Chautauqua Lake (S.M. 214).

87. Exhibit S-19 was a public document, distributed throughout the Appalachian region, and was freely available to the public (S.M. 215, 216).

88. In January 1971, OPS published "New York State Development Plan One", to be used as a functional planning guide by State agencies and by planning bodies of political subdivisions (S.M. 216, 217; Exhibit S-20a; S-20b).

89. Exhibits S-20a and S-20b include as part of the development plan the Southern Tier Expressway corridor and the bridge spanning Chautauqua Lake (S.M. 218).

90. Approximately 8,000 copies of Exhibit S-20a and S-20b were distributed together with press releases announcing the public availability thereof (S.M. 219, 220).

91. In January 1971, OPS published a "New York State Appalachian Development Plan", Exhibit S-21, which represented an updating of Exhibit S-19 (S.M. 220-222).

Defendants' Proposed Findings of Fact.

92. Exhibit S-21 included as part of its planning process the Southern Tier Expressway and the Chautauqua Lake Bridge (S.M. 222).

93. Approximately 2,500 copies of Exhibit S-21 were distributed, 1,000 copies within the Appalachian counties of New York, and were freely available to the public (S.M. 222, 223).

CONCLUSIONS OF LAW

I. Plaintiffs had notice at least as early as March 22, 1972 that the State had prepared an environmental reevaluation on Section "5C" in lieu of an environmental impact statement in full compliance with FHWA procedures in effect at that time (S.M. 292, 297-300; Exhibits S-7, S-11; F-2, F-3).

II. Plaintiffs could have commenced this action prior to the granting of the first PS&E approval on Section "5", which occurred on May 24, 1972 [Exhibit F-1, para. 31; Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (1972)].

III. Private and public commitments have been made in reliance on the completion of the Chautauqua Lake Bridge.

IV. The cost to the State of New York of abandoning Section "5C" would be approximately $22.967 m.

V. The issue of laches as it relates to Section "5C" must be considered in the context of the effect that the loss of Section "5C" would have on Sections "5A", "5B" and "5D".

VI. The balancing of the parties' respective interests and the possible injury and/or inconvenience to each must favor the defendants. [Yakus v. U. S., 321 U.S. 414 (1944)].

Defendants' Proposed Findings of Fact.

VII. Plaintiffs have demonstrated no injury and/or inconvenience to themselves.

VIII. Plaintiffs are guilty of laches. [Pennsylvania Environmental Council v. Bartlett, 315 F. Supp. 238, aff'd 454 F. 2d 613 (1971); Clark v. Volpe, 342 F. Supp. 1324, aff'd 461 F. 2d 1266 (1972)].

IX. Laches is a ground for dismissal of an action brought pursuant to NEPA. [Clark v. Volpe, 342 F. Supp. 1324, aff'd 461 F. 2d 1266 (1972)].

X. The action should be dismissed based on plaintiffs' laches.

DATED: February 4, 1974

Respectfully submitted,

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Defendants' Proposed Findings of Fact.

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STIPULATION.

(SAME TITLE).

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto, as follows:

1. Defendants' proposed Findings of Fact numbered "12", "14", "17", "32", "33", "34", "35", "41", "42", "43", "44", "45", "53", "54", "56", "62", "76", "78", "79", "81", "82", "83", "84", "85", "86", "88", "89", "90" and "91" are accepted as true by plaintiffs;

2. Defendants' proposed Findings of Fact numbered "19", "27", "28", "36", "37", "38", "63", "64", "65" and "66" are accepted as true by plaintiffs, but their relevance to this litigation is objected to; and

3. Defendants' proposed Findings of Fact numbered "2", "13", "16", "46", "47", "48", "50", "52", "55", "57", "58", "59", "60", "67", "68", "69", "70", "71", "72", "73", "74", "75", "77", "80", "87", "92" and "93" are not accepted as true by plaintiffs.

DATED: May 8, 1974

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Stipulation.

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PLAINTIFFS' PROPOSED FINDINGS OF FACT.

(SAME TITLE).

The within action concerns whether or not the Federal and State Defendants should be enjoined from proceeding with the construction of a bridge over Lake Chautauqua until compliance with various federal statutes. The defendants have raised, among other issues, the doctrine of Laches as a complete defense to the present suit.

By order of the District Court on January 17, 1974, this issue was referred to me, as a Special Master, to hear and report on the sole issue of laches as it relates to the appropriateness of granting a preliminary injunction.

At issue in the case is a segment of a highway project planned from Binghamton to the New York State line in Chautauqua County called The Southern Tier Expressway. The particular segment we are here concerned with is designated section 5c of the Southern Tier Expressway, and is composed of a planned bridge over Lake Chautauqua and highway approaches thereto, a section approximately 2.525 miles long.

A hearing was held on January 17th and 18th, 1974, at which time testimony was presented by both defendants and plaintiffs.

Most of the testimony presented by defendant's witnesses consisted of an explanation of the planning, publicity, and important dates when certain actions were taken pursuant to the proposed construction of section 5c, and the amounts of money expended and work done on both the Southern Tier Expressway in general, and section 5c in particular, and also actions of private citizens and corporations on reliance that the proposed bridge would be built. This testimony was offered to prove that plaintiffs had knowledge that the bridge would be built, that they unconscionably delayed bringing the instant lawsuit even though they had this knowledge, and that due to the plaintiffs delay in bringing

suit, the defendants would now be unjustly prejudiced if an injunction was entered at this late date.

From this testimony the following activities were initiated on the following dates:

1) Public hearing held	November 25, 1965
2) Location of bridge approved by Federal Highway Administration (F.H.A.)	May 3, 1967
3) F.H.A. design approval	October 3, 1968
4) F.H.A. authorization of right-of-way acquisition	March 30, 1970
5) Plan, specifications and Estimates (P.S.&E.) approval for demolition of structures acquired	May 24, 1972
6) Demolition work completed	August 25, 1972
7) P.S.&E. approval for construction of the bridge substructure	May 9, 1973
8) Contract awarded for bridge substructure	July 9, 1973
9) Plaintiffs' order to show cause filed	November 23, 1973

While it is difficult to pinpoint exact amounts of work done and money expended up to November 23, 1973, the date when the lawsuit was instituted, according to the affidavit of Donald H. Ketchum, regional director of the New York State Department of Transportation, sworn to on December 14, 1973, the construction of the bridge substructure was 3% complete at that date. Actual work done up to November 23, 1973, includes all right-of-way acquisition, demolition and relocation, engineering plans and studies, tree removal, clearing and some dredging and

grubbing, and the driving of one test pile out of 250 piles. The money expended between final P.S.&E. approval until November 23, 1973, is approximately $1.9 million, out of a total projected cost of a little under $30 million.

These figures relate only to Section 5C, the section which is in issue. While testimony was offered as to work done and money expended for the whole Southern Tier Expressway, we are constrained to only consider the section in issue. Monroe County Conservation Council v. Volpe, 472 F.2d 693, 4 ERC 1886 (1972).

The defendants' witnesses clearly showed that knowledge of the planning of the bridge was widespread due to the local controversy that surrounded the proposal, and plaintiffs frankly admit that they had knowledge that a bridge was planned over Lake Chautauqua. However, plaintiffs contend that while they had knowledge that the bridge was planned, the point at which they could be held to knowledge of the implementation of these plans are in issue. The plaintiffs testified that they had not brought the lawsuit sooner because they were led to believe through meetings and discussions with members of the N.Y.D.O.T. that all laws were being complied with, and that the only way that construction of the bridge could be stopped was by an act of the legislature. In fact, following up on this suggestion, plaintiffs caused to be introduced a bill which, if passed, would have stopped the construction of the bridge. They contend that only after the contract was awarded and it became clear that any legislation, if passed, would come too late to forestall what they considered to be damage to the environment, did they consult with an attorney and bring suit.

In order for the defendants to prevail in their defense of laches, they must prove unconscionable delay on the part of the plaintiffs and prejudice to the defendants. While it would have been better practice if the plaintiffs had brought the suit earlier, any delay in bringing suit cannot be considered unconscionable on their part.

Plaintiffs' Proposed Findings of Fact.

While the plaintiffs could have brought suit at any reasonable time after the laws became effective, for purposes of laches the Court should look to the last possible time suit could have been brought after which a period of delay would be considered. This time is clearly the last act of the defendants which bound them to building the bridge. Environmental Defense Fund v. T.V.A., 468 F2d 1164 (6th Cir. 1972).

The last binding act of defendants occurred when final P.S.&E. approval was given for the building of the substructure of the bridge, or May 9, 1973. Up till this time the defendants were not committed to building the bridge as proposed, and changes could have been made. Moreover, up till this time plaintiffs had the right to assume that defendants would comply with the law.

Therefore, the 6-1/2 month period from P.S.&E. approval until the institution of the suit could be considered delay. However, this entire period could not be considered unconscionable delay. Plaintiffs could not be held to actual notice of P.S.&E. approval, since this notice was not published. Only when bids were advertised for the contract, which was in fact published, could plaintiffs be held to knowledge, which was in June of 1973. At this point plaintiffs would need a certain amount of time to consult with their experts and prepare for this complex case. Environmental Defense Fund v. T.V.A., Id. All in all, then, the delay of a few months could not be considered unconscionable.

In determining whether the Doctrine of Laches should be applied, the court must look to various other consideration.

The defense of laches is an equitable doctrine, and where each party stands in equity must color any conclusion reached. First, it must be pointed out that the rights asserted in the lawsuit are not private rights of individual

plaintiff, but the rights of the public at large in a clean and safe environment, and the right of the public in seeing that laws are complied with. Courts have placed great weight on the public policy favoring environmental protection set forth in the National Environmental Policy Act of 1969. (NEPA) See, e.g., Brooks v. Volpe, 460 F2d 1193 (9th Cir. 1972); Environmental Defense Fund v. T.V.A., 468 F2d 1164 (6th Cir. 1972); Arlington Coalition v. Volpe, 458 F2d 1323 (4th Cir. 1972); Calvert Cliffs v. A.E.C., 449 F2d 1109 (D.C.C. 1971); Jones v. Lynn, --F2d-- (1st Cir. March 22, 1973); Monroe County Conservation Council v. Volpe, Supra; Scenic Hudson Preservation Conference v. F.P.C., 354 F2d 608 (2nd Cir. 1965); City of New York v. United States, 337 F. Supp. 150 (E.D.N.Y. 1972). Many of these courts have found this public policy dispositive of the issue of delay in bringing suit. As was stated by Justice Friendly for a three judge Court in City of New York v. United States, Supra, "The tardiness of the parties in raising the issue cannot excuse compliance with NEPA; primary responsibility under the act rests with the agency."

It should also be pointed out that the defendants should be held to knowledge of their duties under NEPA. The law became effective January 1, 1970, P.S.&E. approval was given after NEPA's effective date. Monroe County Conservation Council v. Volpe. Yet, the defendants admit that they did not prepare an Environmental Impact Statement, the most important element of NEPA. An intimation of the defendants' attitude can be learned from a letter written on April 16, 1973, by John G. Bestgen, the F.H.A. Division engineer for the project, where he states:

> "As you are aware, the procedures of P.P.M. 90-1 have been recently challenged, and there is a very good possibility the Environmental Impact

> Statements may be required prior to P.S.&E. approvals for all projects in the near future. We, therefore, highly recommend that you make every effort to abide by your tentative scheduling for including this project in your July, 1973 letting."

Defendants were clearly attempting to avoid the spirit of NEPA, if not its letter, an element to consider when deciding whether to apply an equitable doctrine such as laches.

If in fact, plaintiffs have delayed in bringing the instant action, it is clear that a certain amount of prejudice has ennured to the defendants. A certain amount of money, approximately $1.9 million has been expended since P.S.&C. approval was given and the lawsuit was filed. During this time span trees were removed and other work was done. Three per cent of the contract was complete on December 14, 1973. However, when compared with other cases which have denied the defense of laches and who have instituted injunctions after money has been expended and construction started, the prejudice in the instant case is slight. Brooks v. Volpe, Supra (all right of way acquired and construction begun): Scheer v. Volpe, 446 F2d 1027 (7th Cir. 1972) (contracts awarded for $1 million and construction begun); Environmental Defense Fund v. T.V.A., Supra (two-thirds of land acquired, $29 million expended, a steel span bridge had been completed and construction had begun or nearly all major components of the project). Arlington Coalition v. Volpe, Supra, (93.9% of all dwellings had been acquired, 98.5% of all businesses had been acquired, 84.4% of all right of way had been acquired, 84.6% of all businesses had been relocated, and $28,670,123.07 had been spent); Calvert Cliffs v. A.E.C., Supra (nuclear power facilities were in various stages of construction): Conservation Society v. Texas, 446 F2d 1013 (5th Cir.

1971) (two end segments leading up to a park were completed and all right of way in the park had been acquired); D.C. Federation v. Volpe, 459 F2d 1231 (D.C. 1970 (work in progress halted on Three Sisters Bridge); Ward v. Ackroyd, 344 F.Supp. 1202 (D.Md. 1972) (all right of way had been acquired and $16,400,000 had been spent); Brooks v. Volpe, 319 F.Supp. 90 (W.D. Wash. 1972) (trees had been cleared on a large part of the project which went through a forest, grading had been done, a substantial percentage of the work was completed and $14 million spent); Arizona Wildlife Federation v. Volpe, -- F.Supp.-- (D. Ariz. 1972) (work was 53% completed); Keith v. Volpe, 352 F. Supp. 1324 (C.D. Calif. 1972) (55% of 6073 parcels were acquired for a total cost of $88,651,000); Environmental Defense Fund v. Corps of Engineers, 324 F.Supp. 871 (D.D.C. 1971) (construction had been proceeding for seven years and the Cross-Florida bridge canal was already 1/3 complete.); Sierra Club v. Froelkle, --F. Supp. -- (S.D. Texas Feb. 16, 1973) (construction 87% complete); James River and Kanawka Canal Parks v. R.M.A., --F. Supp. -- (E.D. Virg. May 7, 1973) (all right of way acquired and a bond issue passed on reliance of the highway construction); Barta v. Brinegar, --F. Supp.-- (W.D. Wisc. May 11, 1973) (of three highway sections, one 70% complete, one 51% complete, and on other construction had begun.)

Moreover, many courts have found that when dealing with NEPA cases, it is proper to invoke the reasoning of the Supreme Court in United States v. City and County of San Francisco, 310 U.S. 16 (1940). In that case the Court stated:

> " . . . we are satisfied that this case does not call for a balancing of equities or for the invokation of the generaiities of judicial maxims in order to determine whether an injunction should have issued . . ."

" . . . The equitable doctrine relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective." Id. at 30-31. Cited in Lathan v. Volpe, Supra, at 1116-1117.

Similarly in approaching the equities involved in a laches defense, the court in Stop H-3 Association v. Volpe, --F. Supp.-- (D. Hawaii, 1972), held monetary loss to not constitute irreparable injury in a NEPA case, citing the language of Green County v. F.P.C., 455 F2d 412 (2nd Cir. 1972) to the effect that ". . . (D)elay is a concomitant of the implementation of the procedures prescribed by NEPA, hence the excuse of delay is not available to defendants." The Court went on to say that "a less stringent standard is required to effectuate the declared policy of Congress, set forth in NEPA . . ." and that any "balancing of the equities will favor plaintiffs."

Finally, this Court must take cognizance that the Supreme Court has been faced with a similar factual situation as the one herein in Citizens v. Volpe, 91 S. Ct. 814 (1971). In that case, a unanimous Court did not hesitate to grant an injunction for noncompliance of Federal law, even though right-of-way had already been acquired and $2,206,000 had been spent.

For all of the foregoing reasons, the defense of laches should be denied.

This memorandum report shall constitute the findings of fact and conclusions of law.

DECISION AND ORDER.

(SAME TITLE).

CURTIN, District Judge

APPEARANCES: Richard J. Lippes, Esq.
Buffalo, New York, for Plaintiffs.

John T. Elfvin, Esq.
United States Attorney
(C. Donald O'Connor, Esq., of Counsel)
Buffalo, New York, for defendant
Claude S. Brenegar, Secretary of
Department of Transportation.

Louis J. Lefiowitz, Attorney General
of the State of New York (Douglas
Dales, Esq., of Counsel), Albany,
New York, for defendant Raymond
T. Schuler, Commissioner of New
York State Department of Trans-
portation.

I. HISTORY OF THE LITIGATION

On November 23, 1973, the plaintiffs commenced this action seeking to enjoin the defendants from continuing the construction of a bridge over Lake Chautauqua. Plaintiffs base their motion for a preliminary injunction on the theory that defendants have failed to comply with the requirements of the National Environmental Policy Act [N.E.P.A.], 42 U.S.C. §4321, et seq., the Federal Aid Highway Act [F.H.W.A.], 23 U.S.C. §101, et seq., the Clean Air Amendments of 1970, P.L. 91-604, 84 F. Stat. §1676, and the Department of Transportation Act, as amended,

[3]
49 U.S.C. §1651, et seq. Plaintiffs' major allegations are that public hearings as required by the statutes were not held, that an Environmental Impact Statement

[E.I.S.] as required by Section 102(2)(C) of N.E.P.A. was not filed, and that a similar statement as required by Section 4(f) of the Department of Transportation Act, 49 U.S.C. §1653(f) and by 23 U.S.C. §138, was not filed. Defendants generally deny the allegations and also set out various affirmative defenses, including an allegation that the action is barred because of laches.

On January 17, 1974 an order of reference to United States Magistrate Maxwell was signed by United States District Judge John O. Henderson. The order of reference is as follows:

> This matter having come on before this Court upon the application of plaintiffs for a preliminary injunction, and upon the motion of the defendant, Brinegar, for a hearing solely on the issue of laches and/or delay and the equitable considerations in connection therewith, and upon the agreement of the parties that such hearing is necessary, and good cause appearing therefor, it is
>
> [4] ORDERED: that this matter is hereby referred to United States Magistrate Edmund F. Maxwell, as special master, to hear and report with all due dispatch, the facts of this matter concerning the issue of laches and/or delay and the equitable considerations in connection therewith as they relate to the appropriateness of granting a preliminary injunction or dismissing this action.

Following Judge Henderson's death in mid-February 1974, the matter was referred to my part. Oral argument was heard on April 30, 1974 on confirmation of the Magistrate's report.

II. THE MAGISTRATE'S REPORT

The Magistrate made two conclusions of law:

1. There has been no showing of unconscionable delay on the part of the plaintiffs, or such prejudice to the defendants, as to constitute laches.

2. The defense of laches should not apply in this action.

The Magistrate also found:

> It is thus recommended that plaintiffs' motion for a preliminary injunction be granted, pending a trial

[5]

> of the merits of this case. (Magistrate's Report at 27.)

Defendants objected to the Magistrate's report on three major grounds: (1) that the Magistrate erred in finding the date of May 9, 1973 (Plans, Specifications and Estimates approval) as the date on which plaintiffs had noticed that defendants would not comply with the law; (2) that the Magistrate erred in failing to consider the entire highway project instead of only the bridge; (3) that the Magistrate's recommendations on the preliminary injunction were beyond the scope of his authority.

In respects other than the objections noted, the defendants accepted the facts found by the Magistrate. Further proceedings were adjourned two weeks so that defendants could present further information on the Appalachian Commission, but nothing more was received by the court on May 13, 1974 except a joint stipulation of certain facts. Neither defendant desired any further evidence to be presented upon the question of whether a preliminary injunction should issue.

[6]

III. LACHES

Defendants' disagreement with the Magistrate's finding that the defense of laches does not apply is based on two arguments: (1) that the time from which plaintiffs knew that their cause of action under N. E. P. A. and other relevant federal statutes accrued occurred prior to Plans, Specifications and Estimates [P. S. & E.] approval on May 9, 1973, and (2) that plaintiffs should be charged with notice that an action under N. E. P. A. accrued by taking into account the total project.

The Magistrate's findings of fact relevant to the question of laches are as follows:

> In 1962, pursuant to New York State Highway Law, §340-C, the general route of a highway designated as the Southern Tier Expressway was authorized. This highway was to run in a generally westerly direction from the Broome-Tioga County Line, near Binghamton, New York, a distance of approximately 250 miles to the Pennsylvania State line in Chautauqua County. The portion of the proposed highway which lies within Chautauqua County is approximately 35 miles long and is designated as Section 5. Section 5C includes the bridge spanning Chautauqua Lake from Stow to Bemus Point. This section is approximately 2.5 miles long and includes approximately .8 miles of structure over Lake Chautauqua

[7]

> and .18 miles over relocated Main Street and relocated Bemus Creek.
>
> In August 1965, the concept of such bridge was approved by the United States Bureau of Public Roads (USBPR). In October 1965, the USBPR approved the Preliminary Location Plans and in November 1965, a public hearing relative to the construction of approximately 14 miles of the

Southern Tier Expressway, including Section 5C, was held in the City of Jamestown, New York. In February 1966, the USBPR approved the transcript of the public hearing as satisfying the requirements of its Policy and Procedure Memorandum then in effect. In March 1966, the Appalachian Regional Commission designated the Southern Tier Expressway for inclusion in the Appalachian Regional Development Act Highway Program, the primary objective of the program being to promote the economic development of areas found by Congress to be significantly underdeveloped. In May 1967, the USBPR in a letter to the New York State Department of Public Works approved the location of the bridge to be constructed across the lake.

On January 1, 1970, NEPA was enacted into law.

On March 30, 1970, the USBPR authorized the commencement of negotiations for acquisition of a right of way in connection with Section 5C. On May 24, 1972, the Federal Highway Administration

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(FHWA), formerly the USBPR, granted Plans, Specifications and Estimates (PS & E) approval for contracts calling for the demolition of buildings on the rights of way encompassing Section 5C and portions of the bridge approaches located in Sections 5B (on the west side of Lake Chautauqua) and 5D (on the east side of Lake Chautauqua). These demolition contracts were awarded in June 1972, and the demolition work was completed in August 1972. Approximately 70 buildings were demolished and 20 families in Section 5C have been relocated. Construction of the bridge was planned in three phases: (1) demolition, which was completed in August 1972;

(2) construction of the substructure of the bridge; and (3) construction of the superstructure of the bridge.

On May 9, 1973, the FHWA granted PS & E approval for construction of the bridge substructure. On July 9, 1973, a contract in the amount of $14,700,000 was awarded to Raymond International, Inc. for construction of the bridge substructure.

Between July 9, 1973, (the contract award date), and November 23, 1973, (the date of commencement of this action), trees have been removed, land has been stripped, channel relocation work, dredging, and other general work preparatory to the driving of pilings and construction of the substructure has been done. Subsequent to November 23, 1973 and prior to January 17, 1974, one of a contemplated five test pilings was put in. As of December 14, 1973, the contract for the bridge substructure was approximately 3 percent complete (affidavit of Donald

[9]

Ketchum, Regional Director, New York Department of Transportation, Exhibit S-2), and approximately $4.7 million has been spent on the project from 1962 to date. The present contract for the substructure calls for the installation of approximately 250 pilings and for completion of the substructure in June 1976. A contract for the superstructure of the bridge would be expected to be completed one to two years thereafter and, thus, according to present expectations, the bridge could carry traffic in 1977 or 1978. The total estimated cost of the completed bridge is about $29 million.

Magistrate's Report at 3-6.

The court finds that the Magistrate's finding that P.S.&E. approval was the critical date is a correct determination. "Plaintiff had no right, let alone obligation, to bring suit until the FHWA's sponsorship . . . reached the point of a 'proposal for . . . major Federal action' within the ambit of . . . N.E.P.A., 42 U.S.C. §4332(2)(C) . . . ." I-291 Why? Association v. Burns, at 19 (D.C. Conn.) (Feb. 7, 1974). In considering when a highway project has become federal for purposes of N.E.P.A., it is necessary to consider that in federal highway planning there are discrete stages and that federal approval is necessary at each stage: (1) a state's highway "system,"

[10]

(2) a particular highway location, (3) its design, (4) P.S.&E., (5) construction. See City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972). "In all of the cases in which a court found a highway to be federal, the federal government had at least granted location approval." Id. at 259. The Second Circuit has been even more specific as to when a highway project becomes federal. "[T]he federal government is not obligated to fund a particular project until the Secretary of Transportation has given P.S.&E. approval [citing 23 U.S.C. §106(a)]." Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 699 (2d Cir. 1972). The court further finds that the delay between P.S.&E. approval (May 9, 1973) and the filing of this lawsuit (November 23, 1973) is not unreasonable. See City of New York v. United States, 337 F. Supp. 150 (E.D.N.Y. 1972).

As to defendants' contention that the Magistrate should have considered other portions of the highway adjacent to the bridge in making his determination,

the weight of case law in this circuit is to the contrary. See Monroe County Conservation Council, Inc. v. Volpe, supra

[11]

(construction of 14.25 miles connecting two completed segments, totalling 16 miles of Rochester Outer Loop enjoined pending preparation of E.I.S.): I-291 Why? Assoc. v. Burns, supra ("this [$15,000,000.] figure for Connecticut's general expenses in connection with I-291 cannot fairly be weighed against plaintiff in considering the applicability of laches."). See also Greene County Planning Bd. v. Fed. Pow'r. Comm., 455 F.2d 412 (2d Cir. 1972).

For the reasons enunciated herein as well as those given in the Magistrate's Report, the determination that the defense of laches does not apply is hereby adopted.

IV. PRELIMINARY INJUNCTION

Again, the court notes that no party desired to present any further evidence on the question of whether a preliminary injunction should issue. Defendants substantially accepted the findings of fact made by the Magistrate, with certain objections the court shall consider.

[12]

However, defendants objected to the Magistrate's recommendation that a preliminary injunction should issue as beyond the scope of his authority as delineated in the order of reference. For purposes of discussion, the court assumes that the Magistrate's recommendation that a preliminary injunction should issue was beyond the grant of his authority. [1]

Therefore, the court shall review the facts which the Magistrate found on the preliminary injunction issue that

are substantially uncontroverted and consider, relying on all sources (proposed findings of fact, memoranda of law, transcripts of the hearing before the Magistrate and oral argument before the court), defendants' objections to those findings.

The standard for the granting of a preliminary injunction is a two-prong test: there must be a showing of probable success on the merits and proof of irreparable harm to those seeking the injunction. See Gulf & Western Industries v. Great Atlantic & Pacific Tea Co., Inc., 476 F.2d 687 (2d Cir. 1973).

The Magistrate's Report included the following on the underlying facts significant to the determination

[13]

of injunctive relief:

> A. The Probability of Success on the Merits
>
> Admittedly, no EIS, as such, was prepared by any Federal agency. In 1971, an "Environmental Reevaluation" (Exhibit S-5) was prepared by the NYSDOT and approved by the FHWA. This document consists primarily of correspondence among the NYSDOT, its engineering consultants, and the FHWA, relative to the construction of the bridge, but also includes records of the fears raised by the State Department of Environmental Conservation and of conferences relative to environmental problems. In March 1973, the NYSDOT submitted an "Environmental Reevaluation Supplemental Report" (Exhibit S-6), and this document was approved by the FHWA on April 16, 1973. It deals with engineering aspects as well as the socioeconomical and environmental impact of the bridge.

The pertinent section of NEPA relating to the necessity of an EIS is Section 102 (42 U.S.C. §4332) which states in part as follows:

> "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall . . . ."
>
> . . . .

[14]

> "(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which

[15]

are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;" (emphasis supplied)

In Greene County Planning Board v. Federal Power Commission, supra., the court held that the "primary and nondelegable responsibility" for fulfilling the function of Section 102(2)(C) lay with the Federal agency and that:

"The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of (the State agency) for its own." (455 F.2d at p. 420)

See also Conservation Society v. Secretary of Transportation, 5 ERC 1683 (Dist. Vt., July 26, 1973) and I-219 Why? Association v. Burns, supra., at page 49 of the court's decision. Furthermore, there is nothing in the record of this hearing to indicate that the required Federal interagency consultation relative to environmental impact was had or that the other requirements of Section 102(C) were met.

As to the defendants' allegation that an EIS was not required because of "design approval" before February 1, 1971, as previously stated, there is a serious question as to whether "design approval" was in fact

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granted before February 1, 1971. Even if such were to be conceded, the Monroe County v. Volpe case, supra., would require an EIS on any project wherein PS & E approval was not given prior to the effective date of NEPA. In Arlington Coalition v. Volpe, (CA 4 1972) 458 F.2d 1323, 3 ERC 1995, the court held that the requirements of Section 102(C) would be applicable to a project in progress on the effective date of NEPA until that stage of progress had been reached where:

> ". . . the costs of altering or abandoning the project could so definitely outweigh whatever benefits that might accrue therefrom that it might no longer be 'possible' to change the project in accordance with Section 102." (p. 1331)

The court further stated at page 1332:

> "Manifestly the date of design approval alone does not accurately measure whether Arlington I-66 has reached the crucial stage, and determining the applicability of Section 102(C) by this standard alone would be arbitrary and capricious agency action and an abuse of administrative discretion."

It thus seems reasonable to believe that based on the record herein there has been a showing of probable success on the part of the plaintiff.

[17]

B. The Showing of Irreparable Harm

At the time of the hearing, according to the testimony, one test piling of a contemplated 250 pilings had been driven and the construction of the bridge substructure contract was approximately 3 percent complete.

If no injunction were to issue, it is reasonable to assume that by the time a final determination of the issues on their merits has been made, the construction will have reached that stage of completion wherein for economic reasons, it would be impossible to turn back or alter the work and thus the environment might be irreparably affected. The State Department of Environmental Conservation expressed this fear in its letter of December 16, 1970, (Exhibit S-5), when it stated: "The ecology of Chautauqua Lake could be disrupted both during and after construction . . . ."

As has been stated by the attorneys for the parties, the issue in this lawsuit is not whether the bridge should be built, but instead, whether there has been proper compliance with the procedural requirements of NEPA. The determination as to completion of the bridge is to be made by the appropriate State and Federal agencies, in compliance with the law and, if it is determined that an EIS is required, upon a weighing of all of the factors raised by that statement, including the economic needs as well as the environmental requirements of the public. It may well be that upon completion of the EIS the responsible agencies will be fully satisfied that the environment is being protected and that the

[18]

bridge should proceed to completion as planned. But it would better serve the public if that protection were assured prior to continuation of construction, when possible changes in protection of the environment can be accomplished.

Magistrate's Report at 22-27.

Defendants' objections to these findings of fact may be characterized as objections of omissions. Defendants assert that (1) the total highway project surrounding the bridge should be considered, and (2) private monies expended in the private sector in reliance that the total project would be completed on time. That no Environmental Impact Statement as defined in N.E.P.A. was prepared by any federal agency is admitted. In the court's opinion, this admission is critical. The court refuses, as a matter of law, to give weight to either the total highway project or the private reliance upon the bridge's completion. See N.E.P.A., 42 U.S.C. §4332(c); Greene County Planning Bd. v. Fed. Pow'r. Comm., supra; Monroe County Conservation Council, Inc. v. Volpe, supra.

A preliminary injunction against further construction of the Chautauqua Lake Bridge (parcel "5C)

[19]

pending compliance with N.E.P.A. shall issue forthwith. Defendants may complete the driving of the five test pilings. If other work is necessary to shut the project down while the necessary environmental impact study is being made, the defendants may move upon notice for further relief.

So ordered.

s/ JOHN T. CURTIN
JOHN T. CURTIN
United States District Judge

DATED: May 20, 1974

1

Although the court believes there is a strong argument in favor of the plaintiffs' position that the Magistrate's recommendation that a preliminary injunction should issue was within his authority, see Order of Reference, supra, the court has made the opposite assumption so as to avoid the "clearly erroneous" standard accorded to the findings of a special master. See Fed.R.Civ.Proc. 53(e)(2).

STIPULATION.

(SAME TITLE).

WHEREAS the New York State Department of Transportation has submitted that certain construction in connection with the Chautauqua Lake project, which is the subject of this litigation, is absolutely essential for the public welfare and safety, for the protection of work heretofore performed, for the protection of surrounding real property, for the prevention of environmental damage, for the re-establishment of all local services and for the orderly suspension or termination of construction operations, it is hereby

STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the following construction may be performed within the project area:

Stow side

1. Backfill west abutment and pier excavations;

2. Clear Ball Creek Channel;

3. Dismantle pile racks and stiffleg derrick, remove foundations, and cut off H-piles flush with ground;

4. Shape, topsoil if necessary, and seed all disturbed areas;

5. Grade and seed Sec. 5B disposal area;

6. Correct and/or construct necessary drainage;

7. Pour concrete into tube piles previously driven in Pier 1;

Chautauqua Lake

8. Cut off tubular concrete piles at mudline;

Bemus Point Area

9. Complete substructure of Bridge No. 5;

10. Re-establish Popal Lane;

Stipulation.

11. Repave Bemus Creek Road from Main Street to approximately 150 feet south of Service Road and provide drainage;

12. Re-establish driveways as necessary;

13. Remove dredge discharge pipe, and patch crossings at Main Street and Barton Avenue;

14. Repave Ralph Avenue from Main Street to Williams Street and repair drainage structures;

15. Backfill Shear Key "C";

16. Grade and seed Road A, install necessary drainage;

17. Repair shoulders along Main Street, from Ralph Avenue to Sec. 5D;

18. Correct and/or construct necessary drainage;

19. Grade, topsoil if necessary, and seed along Mainline and ramps from the Lake to Sec. 5D; and

20. Perform such reasonable landscaping work as may be necessary as the shut-down work progresses.

An order embodying the foregoing may be entered by any party without notice.

DATED: June 4, 1974

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Defendant Schuler
Office and P. O. Address
The Capitol
Albany, New York 12224

BY s/ DOUGLAS S. DALES, JR.
DOUGLAS S. DALES, JR.
Assistant Attorney General

Stipulation.

JOHN T. ELFVIN, ESQ.
United States Attorney in and for
the Western District of New York
Attorney for Defendant Brinegar
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502 U.S. Courthouse
Buffalo, New York 14202

BY s/ C. DONALD O'CONNOR
C. DONALD O'CONNOR
Assistant U.S. Attorney

RICHARD J. LIPPES, ESQ.
Attorney for Plaintiffs
Office and P. O. Address
800 Western Building
Buffalo, New York 14202

BY s/ RICHARD J. LIPPES
RICHARD J. LIPPES

ORDER ~~APPEALED FROM~~.

(SAME TITLE).

Upon the stipulation of the attorneys for the respective parties hereto, dated June 4, 1974, it is

ORDERED, that the following construction may be performed within the project area:

Stow Side

1. Backfill west abutment and pier excavations;

2. Clear Ball Creek Channel;

3. Dismantle pile racks and stiffleg derrick, remove foundations, and cut off H-piles flush with ground;

4. Shape, topsoil if necessary, and seed all disturbed areas;

5. Grade and seed Sec. 5B disposal area;

6. Correct and/or construct necessary drainage;

7. Pour concrete into tube piles previously driven in Pier 1;

Chautauqua Lake

8. Cut off tubular concrete piles at mudline;

Bemus Point Area

9. Complete substructure of Bridge No. 5;

10. Re-establish Popal Lane;

11. Repave Bemus Creek Road from Main Street to approximately 150 feet south of Service Road and provide drainage;

12. Re-establish driveways as necessary;

13. Remove dredge discharge pipe, and patch crossings at Main Street and Barton Avenue;

Order A[redacted]m.

14. Repave Ralph Avenue from Main Street to Williams Street and repair drainage structures;

15. Backfill Shear Key "C";

16. Grade and seed Road A, install necessary drainage;

17. Repair shoulders along Main Street, from Ralph Avenue to Sec. 5D;

18. Correct and/or construct necessary drainage;

19. Grade, topsoil if necessary, and seed along Mainline and ramps from the Lake to Sec. 5D; and

20. Perform such reasonable landscaping work as may be necessary as the shut-down work progresses.

So ordered.

John T. Curtin
JOHN T. CURTIN
United States District Judge

DATED: June 5, 1974

NOTICE OF APPEAL (Defendant, Schuler).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROYAL STEUBING
231 E. Virginia Boulevard
Jamestown, New York
CHAUTAUQUA COUNTY ENVIRONMENTAL
DEFENSE COUNCIL
JOSEPH CATANIA
Drive-In Motel
Westfield, New York
ROBERT SEINDELL
19 Chestnut Street
Jamestown, New York
JAMESTOWN AUDUBON SOCIETY
MARTIN OQUIST
Greenhurst, New York
JACK LLOYD
Greenhurst, New York
RICHARD MUDGE
49 Peleison Street
Jamestown, New York
TROUT UNLIMITED
ALAN REPPENHAGEN
Silvercreek, New York
CHAUTAUQUA COUNTY FEDERATION OF
SPORTSMEN
CHARLES MOHNEY
Bemus Point, New York
CHAUTAUQUA LAKE POWER BOAT CLUB,

Plaintiffs

-vs-

CLAUDE S. BRENEGAR, SECRETARY OF
DEPARTMENT OF TRANSPORTATION
400 7th Street S.W.
Washington, D.C. 20590
RAYMOND T. SCHULER, COMMISSIONER,
NEW YORK STATE DEPARTMENT OF
TRANSPORTATION
Albany, New York,

Defendants

Notice of Appeal (Defendant, Schuler).

SIRS:

PLEASE TAKE NOTICE that the defendant, Raymond T. Schuler, hereby appeals from the Order of the Honorable John T. Curtin entered in this action on May 20, 1974.

DATED: Albany, New York
June 18, 1974

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Defendant Schuler
Office and P. O. Address
The Capitol
Albany, New York 12224

BY /s/ DOUGLAS S. DALES, JR.
DOUGLAS S. DALES, JR.
Assistant Attorney General

TO: RICHARD J. LIPPES, ESQ.
Attorney for Plaintiffs
Office and P. O. Address
800 Western Building
Buffalo, New York 14202

HONORABLE JOHN T. ELFVIN
United States Attorney
Office and P. O. Address
502 U.S. Courthouse
Buffalo, New York 14202

NOTICE OF APPEAL (Defendant, Brinegar).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROYAL STEUBING
231 E. Virginia Boulevard
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CHAUTAUQUA COUNTY FEDERATION OF
SPORTSMEN
CHARLES MOHNEY
Bemus Point, New York
CHAUTAUQUA LAKE POWER BOAT CLUB,

Plaintiffs

-vs-

CLAUDE S. BRENEGAR, SECRETARY OF
DEPARTMENT OF TRANSPORTATION
400 7th Street S.W.
Washington, D.C. 20590
RAYMOND T. SCHULER, COMMISSIONER,
NEW YORK STATE DEPARTMENT OF
TRANSPORTATION
Albany, New York,

Defendants

Notice of Appeal (Defendant, Brinegar).

NOTICE IS HEREBY GIVEN that Claude S. Brenegar, Secretary of Department of Transportation, the defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the decision and order of United States District Court for the Western District of New York, Honorable John T. Curtin, District Judge, made and entered on May 20, 1974, which order granted plaintiffs application for a preliminary injunction.

DATED: Buffalo, New York, July 18, 1974

JOHN T. ELFVIN
United States Attorney in and for
the Western District of New York
Attorney for Defendant, Claude S.
Brenegar, Secretary of Department
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Buffalo, New York 14202

By: /s/ C. Donald O'Connor
C. DONALD O'CONNOR
Assistant United States Attorney

TO: LOUIS J. LEFKOWITZ
Attorney General of State of New York
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Albany, New York 12224
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RICHARD J. LIPPES
Attorney for Plaintiffs
800 Western Building
Buffalo, New York 14202

Proceedings, dated Jan. 17, 1974.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROYAL STEUBING, CHAUTAUQUA COUNTY ENVIRONMENTAL DEFENSE COUNCIL, JOSEPH CATANIA, ROBERT SEINDELL, JAMESTOWN AUDUBON SOCIETY, MARTIN OQUIST, JACK LLOYD, RICHARD MUDGE, TROUT UNLIMITED, ALAN REPPENGAGEN, CHAUTAUQUA COUNTY FEDERATION OF SPORTSMEN, CHARLES MOONEY, CHAUTAUQUA LAKE POWERBOAT CLUB,

Plaintiffs,

-vs-

CLAUDE S. BRENEGAR, Secretary of the DEPARTMENT OF TRANSPORTATION, RAYMOND T. SCHULER, Commissioner of the NEW YORK STATE DEPARTMENT OF TRANSPORTATION,

Defendants.

Proceedings taken before EDMUND F. MAXWELL, United States Magistrate, taken in the U. S. Courthouse, Buffalo, New York, taken on January 17th, 1974, commencing at 11:45 A.M., before ANTHONY J. CUVIELLO, Notary Public.

Discussion.

APPEARANCES: RICHARD J. LIPPES, ESQ.,
Suite 800,
Western Building,
15 Court Street,
Buffalo, New York,
Appearing for the Plaintiffs.

LOUIS J. LEFKOWITZ, ESQ.,
Attorney General for the State
of New York,
By DOUGLAS DALES, ESQ.,
Assistant Attorney General,
Justice Building,
Albany, New York,
Appearing for Raymond T. Schuler.

JOHN T. ELFVIN, ESQ.,
United States Attorney,
By C. DONALD O'CONNOR, ESQ.,
Assistant United States Attorney,
United States Attorney,
United States Courthouse,
Buffalo, New York,
Appearing for Claude S. Brenegar.

THE COURT: For those of you who are not attorneys in the proceeding, I'm sorry for the delay, which seemingly has been encountered, but I do wish to state to you that I think we may have saved considerable Court time because from approximately ten o'clock until now, counsel for both sides have been going through various records which may be

received in this proceeding and hopefully, it's my understanding that they may stipulate to introduction of evidence in many of these records. As I say, it has saved considerable Court time. We have not been sitting back relaxing from eleven o'clock until now. It's my understanding the purpose of this hearing, it's an evidentiary hearing relating only to the question of whether or not Laches would apply and Plaintiff's request for relief which has been set out in their complaint and motion for preliminary injunction. Is there any opening statement which you wish to make, Mr. Dales, on behalf of the State of New York on this hearing?

MR. DALES: None, your Honor.

THE COURT: Mr. O'Connor?

MR. O'CONNOR: No, I don't either, your Honor.

THE COURT: Mr. Lippes?

MR. LIPPES: No, your Honor.

THE COURT: All right. It's my understanding that the Defendants would have the burden in

this matter and would be going ahead with the evidence as to the question of Laches.

MR. DALES: That would be my understanding, your Honor, we have raised the defense of Laches, I believe we would have the burden of going forward with the proof and would be subject then to rebuttal by the Plaintiffs.

THE COURT: Are there exhibits offered in evidence by stipulation?

MR. DALES: Yes, there are.

THE COURT: Have they been marked?

MR. DALES: They've not been marked. There are ten State exhibits which we intend to offer, twelve exhibits, excuse me. Ten of which counsel has stipulated to. Two we'll have to lay foundation for and introduce separately.

THE COURT: Why don't you have them marked now in evidence, mark them State, Capital S-1 through 10.

MR. DALES: Could I ask that the first be marked 1 through 8 and leave a space for 9 and 10,

Discussion.

and then the last two be marked S-11 and 12.

THE COURT: Are 9 and 10 the ones in dispute?

MR. DALES: Yes, they are in dispute.

MR. O'CONNOR: Could I suggest they be marked for identification and they can be marked right now.

THE COURT: Mark them all for identification and mark all of the exhibits with the exception of 9 and 10 as in evidence.

(Whereupon thirteen documents were then received and marked S-1, 2, 3, 4-A, 4-B, 5, 6, 7, 8, 11 and 12 in evidence.)

(Whereupon three documents were then received and marked S-9, 10-A and 10-B for identification.)

MR. DALES: May I proceed, your Honor?

THE COURT: Surely, for purposes, for my own purposes, are the exhibits which are on the wall, marked in evidence?

MR. DALES: Yes, they are, your Honor.

THE COURT: What exhibit is that?

MR. DALES: That is Exhibit S-1.

THE COURT: All right. Call your first witness.

MR. DALES: The State calls Donald Ketchum.

D O N A L D H. K E T C H U M, after being duly called and sworn, testified as follows:

DIRECT EXAMINATION BY MR. DALES:

Q. Mr. Ketchum, what is your present title?

A. I'm Regional Director for the New York State Department of Transportation here in Buffalo.

Q. And, for how long a period of time have you held that title?

A. I've been Regional Director since May of 1970.

Q. And, prior to that were you employed by the Department of Transportation of the State of New York?

A. I was.

Q. In what capacity, sir?

A. Immediately prior to being Regional Director, I was Assistant District Engineer and prior to that the Design Engineer back to September of 1962.

Q. Now, could you tell the Court briefly what your present duties and responsibilities encompassed?

A. As Regional Director, I'm regionally responsible for all Department activities under the direction of the Commissioner of Transportation. This includes planning, design, real estate acquisition, construction, maintenance and traffic engineering, that's most of them.

Q. In your position as Regional Director, are you familiar with the general facts in history that surround the Southern Tier Expressway?

A. I am.

Q. On the wall to your left, Mr. Ketchum, is a map which has been marked S-1 in evidence, could you describe it briefly, for the Court, and point out in your own words the sections of the roadway legally known as the Southern Tier Expressway?

A. We have added to these New York State planning maps that you designated in evidence, Exhibit S-1, the Southern Tier Expressway, which is described in the Highway Law, Section 340 C, commencing at the Tioga Broome County Line, extending westerly more or less along, parallel and near the location of the existing Route 17, to a western terminus at the Pennsylvania State Line. This is indicated in red

for the most part, the solid part indicating the completed portions, the dashes indicating various stages of completion of construction for design.

Q. With the Court's permission, could I ask Mr. Ketchum to step down and point to these for the verification of the Court?

THE COURT: Certainly. We don't have a pointer.

THE WITNESS: I'll use a pencil, if I may.

BY MR. DALES:

Q. Would you first describe the route, the masterline route for what is generally following Route 17, is it?

A. Yes.

Q. Would you describe where it generally begins and generally ends?

A. The Southern Tier Expressway is part of a new highway that has been developed in New York State all the way from the northerly State Thruway at Harriman, New York, running more or less east and west, and the southern part of New York State as a developmental highway. The Southern Tier Expressway, as mentioned earlier, that designation starts at this point right here.

Q. Is that the Broome County-Tioga County Line?

A. That's correct.

Q. What is the construction status of the highway up to the Broome County-Tioga County Line from the east?

A. Beginning at the -- from the east, it's completed and traffic is using it, east of the Broome-Tioga County Line.

Q. Does it have a designation?

A I believe it's designated as Route 17.

Q. Is it called the quick way?

A Yes, it is.

THE COURT: May I interrupt, do I understand that portion east of the Broome County-Tioga County Line is not actually designated as the Southern Tier Expressway?

THE WITNESS: That highway is not described that way.

BY MR. DALES:

Q Are all of the highways in New York State that are State highways defined by statutes?

A They must be described in the Highway Law before we can work on them.

Q They run, I gather, from Point A to Point B?

A That's right.

Q In that general direction?

A They're described generally in the Highway Law beginning at the Tioga County-Broome County Line working westerly, if I may, the highway is completed up to the vicinity of Hornell and a village called Almond, complete and there's traffic from there to Cuba more or less at the Allegany-Cattaraugus County Line. The final contracts under construction right now, rather the final work is under -- is being done on the construction contract at this time. That portion of the highway is in Region 6, my region is Region 5, and it encompasses the next two counties, Cattaraugus and Chautauqua, and that is the part I'm most familiar with. We have indicated on this map the various sections that we have designated for our purposes as construction contracts with an alphabetical letter A through S.

Q Are those letters carried now throughout the project in all of these planning and development stages?

It is. Do you want a recitation of each section now?

Q. Not right now, Mr. Ketchum.

A. Basically in the -- well, I'll let you --

THE COURT: Where is 5-A, is that further westerly or --

THE WITNESS: 5-A is the most westerly, beginning at the Pennsylvania State Line.

BY MR. DALES:

Q. The letters, I guess --

A. The letters progress alphabetically eastward, we skipped a couple of letters that might be confusing such as I.

Q. All right. Now, have the section that is in issue in this lawsuit, 5-C, had it progressed to a stage in 1965 where public hearings were required?

A. That's correct, 5-C, of course is our designation for the Chautauqua Lake Bridge and its approaches, yes.

Q. Mr. Ketchum, did you execute an affidavit in December that set forth a very brief history of the Section 5-C project for the time it was designated for progression until --

A. Yes, I did. I believe that's an exhibit, I signed that affidavit on December 14th.

MR. DALES: Your Honor, that is Exhibit S-2.

THE COURT: All right. That's in evidence without objection?

BY MR. DALES:

Q. That is in evidence, yes. Does Exhibit S-2, Mr. Ketchum, include certain appendices which document the various stages of progression, that is to say Federal approval?

A. Yes, it does. This was referred to this, the texts are attached.

Q. Now, referring you to that Exhibit S-2, Mr. Ketchum did the predecessor to the Federal Highway Administration, the Bureau of Public Roads, approve the holding of a hearing as part of its requirements?

A. Yes.

Q. In 1965?

A. Yes, they did so on October 14th, 1965.

THE COURT: I'm sorry, Mr. Dales, if you're going to make reference to an affidavit, do you by any chance have an extra copy of it? If you don't, don't worry about it.

MR. DALES: I can --

MR. O'CONNOR: Mr. Magistrate, do you have the Court

record?

THE COURT: I have the original but I just thought that I might want to use one to mark one so if you have another one --

MR. DALES: I don't have one with me, but I can arrange to have one prepared.

THE COURT: If you could do it, it might be of help to me. I do have the original in front of me in any case. Go ahead.

BY MR. DALES:

Q. Had the Bureau of Public Roads, Mr. Ketchum, approved the preliminary location and plans for Section 5-C in 1965?

A. Yes, on that date that was just mentioned.

Q. Did that preliminary location plan approval include the bridge concept?

A. Yes, it did.

Q. And, is that keyed in as an appendix on your affidavit, sir, that approval itself?

A. Yes, Appendix A.

Q. And at that time, sir, did the Bureau of Public Roads authorize the construction of the bridge for presentation at this public hearing?

A. Yes, they did, that's included in that statement.

Q. Was this hearing advertised?

A. Yes, it was advertised in the Jamestown Post Journal on November 12th, 1965, and November 19th, 1965 in the legal notice section.

Q. And, was the hearing held?

A. It was, on November 25 of 1965.

Q. And, were the minutes of that hearing transcribed?

A. Yes, they were.

Q. And, were they required to be transcribed under Federal requirements?

A. Yes, they are.

MR. DALES: Your Honor, that is Exhibit S-3, it's been stipulated in evidence.

THE COURT: All right.

BY MR. DALES:

Q. Could you tell this Court, sir, whether that hearing was sparsely attended or well attended?

MR. LIPPES: Object to that, your Honor, it calls for a conclusion on what is sparsely or well attended.

THE COURT: I'll allow him to answer as to how many people actually attended.

BY MR. DALES:

Q. Let me withdraw the question and I'll rephrase it, your Honor. Can you tell from the minutes of the hearing, Mr. Ketchum, how many people spoke at the hearing?

A. Yes, I can, and this is part of that document and it's listed on the people that spoke, they're listed, summarized and it begins on Pages A, B and C, numbering between twenty and twenty-five people.

Q. And, were statements in writing accepted and made part of the record?

A. Yes, that is our usual procedure. We accept them and consider them equally with a spoken statement.

Q. As part of your presentation at the hearing, were any maps made available?

A. Yes, it's very helpful to use displays when describing projects and we did so at this hearing.

Q Your Honor, the maps are designated 4-A and 4-B, 4-B the rather large -- I don't see where we can put it up, but it is -- well, perhaps I should let Mr. Ketchum, let me show this to you, Mr. Ketchum, is this the map that is 4-A in evidence, can you describe it for the Court?

A. This is a map that we developed to try and show the entire subjects of the hearing on one small map, it's a small scale map, I believe one inch equals two thousand feet scale and we show the limits of the Southern Tier Expressway that we were considering at the hearing, Sections C, D and E.

Q. Is it a composition of the U.S.C.G. maps?

A. That is the origin of the maps, the U.S.C. & G. maps or U.S.C.G., it's noted on the map, I'm not sure. This covers C, D and E, Sections C, D and E.

THE COURT: All right.

BY MR. DALES:

Q. Well, I show you this Exhibit marked 4-B, and ask if you could describe that?

A. Exhibit 4-B is a larger scale map, one inch equals two hundred, it shows in greater detail the subject under discussion and it originates from geographical photographs and shows many of the land features as well as location of the road itself.

Q. Now, on Exhibits 4-A and 4-B, is there any notice to begin seeing that there is a bridge planned as part of the project?

A. Both maps show the Southern Tier, the proposed

Southern Tier Expressway crossing Chautauqua Lake at the Bemus Point-Stow area.

Q The general location that the bridge is apparently planned?

A That's correct.

Q Did there come a time, sir, when you sought approval from the Bureau of Public Roads that the hearing that was held satisfied the requirements of the Bureau of Public Roads at this time?

A That's part of the procedure, yes, we requested that approval.

Q Was that approval given?

Yes, on February 21, 1966, they acknowledged approval of the transcript of the November 23rd hearing and affirmed that the requirements of PPM 20-8 were satisfied.

THE COURT: What do you mean by that PPM?

THE WITNESS: Those are documents produced by the Bureau of Public Roads or -- not the Bureau of Public Roads, the Federal Highway Administration, that described in more detail the procedures we must follow, and in meeting the requirements of the Federal

Highway Act.

THE COURT: What does PPM stand for?

THE WITNESS: Policy and Procedure Memorandum.

THE COURT: All right.

BY MR. DALES:

Q And, was that PPM 20-8 at the time, that was -- It was in effect to the --

A That was the requirement that had to be met and -- And the Federal Highway Administration felt we had met the requirements of Policy and Procedure Memorandum. And, subsequently, we were given permission to proceed with the portion of the preliminary plans that was, authorization was given by the Federal Highway Administration May 31, 1966.

Q All right. Now, in the meantime, did the highway, the Southern Tier Expressway receive any other designation?

A I'm not sure what you're looking for here?

Q Did the highway, the Southern Tier Expressway, were plans made for it to be considered part of the Appalachian Program?

A Yes, I'm sorry, it was along about this period that a new Federal program was incorporated which was

called Appalachia. Under the direction of the Appalachia Commission to determine if certain areas of the State needed some Federal funding for Governmental purposes and both of those counties in my region became a part of this Appalachia Region and this project is funded with Appalachia Developmental funds.

Q It received the designation as an Appalachia Developmental corridor highway, do you know the date, sir?

A Yes, this was designated for inclusion in the Appalachia Regional Developmental Act on March 9th of 1966.

Q Could you tell me, Mr. Ketchum, when the Federal Highway Administration -- again, for the Court's edification, may I say that sometime in this period between when this project got off the ground, when it started flapping its wings, the designation from Bureau of Public Roads changed to the Federal Highway Administration, I'm not sure exactly when it was, but when we talk of the BPR and FHWA, they are the same agency, if I'm not mistaken, but they've got a different name.

THE COURT: All right. I understand that. Do you know when that actually happened, Mr. O'Connor?

MR. O'CONNOR: I think sometime in '68.

THE COURT: The date of the change is not material, is it, Mr. Lippes?

MR. LIPPES: No.

MR. DALES: It's just confusing to someone who isn't familiar with it, to throw these initials around without some clarification.

THE COURT: I understand exactly what you mean, Mr. Dales.

BY MR. DALES:

Q Now, I refer you, Mr. Ketchum, to Appendix E attached to your affidavit and ask you, sir, was the present location of Project 5-C approved by the Federal Highway Administration at some time?

A Yes, on May 3rd of 1967, the Federal Highway Administration approved the present location of the bridge.

Q Now, at some later time was there a requirement made by the Federal Highway Administration that an environmental evaluation be prepared for this

project?

A Yes, we were required to do this under applicable statutes and on September 23rd, 1971, the Federal Highway Administration approved the environmental re-evaluation.

MR. DALES: May I say, your Honor, this is Exhibit S-5.

THE WITNESS: Incidentally, this was in accordance with FHWA draft memorandum dated November 24th, 1970, and the FHWA National Environmental Policy Act guidelines dated November 30th, 1970.

BY MR. DALES:

Q Could you describe for the Court briefly, Mr. Ketchum, what is included in this environmental re-evaluation made in 1971?

A Well, of course, I believe this has been entered in evidence.

Q Yes, S-5.

A Of course, we're addressing ourself to many of the issues that are now required under the environmental impact statement procedures and we recite there all, I believe all of the opportunities and concerns

expressed by the citizens about the environment and impact of the bridge, and our responses to them.

Q Did there come a time, sir, when the Federal Highway Administration approved a supplemental re-evaluation for Project 5-C?

A Yes, their approval was given on March 8th, 1973. They asked us to update our re-evaluation.

Q I'll refer you to Appendix I in your affidavit, S-2 and ask, did there come a time when the Federal Highway Administration approved the supplemental re-evaluation and their approval was obtained?

A I'm sorry, that date I gave you before was the date that we forwarded it to the Federal Highway Administration, it was subsequently approved on April 16th, 1973.

Q All right. With respect to the bridge contract itself, Mr. Ketchum, can you describe in lay terms what was involved in putting a bridge across that lake? Is it one contract or two contracts, how many contracts are there? And, what are they designed to do?

A This particular contract includes the structure itself or this 5-C preparation of the Southern Tier

Expressway includes the structure over the lake plus the approaches and connections to the first, basically first major highway, State highway on each side of the lake. Our contracts are in several pieces, we thought it best to develop them this way. We had a demolition contract first to clear the area of buildings, residences and businesses. This accounted for the bulk of the buildings. We also demolished buildings with our own maintenance forces and in the contract, construction contract itself. Our first major construction contract is a sub-structure contract as far as the lake crossing is concerned.

Q What does that mean in lay terms?

A Those are foundations on which the bridge deck, that is the portion you drive on is placed.

Q This is what's going to hold the bridge up?

A This is what will hold the bridge up.

Q And, was Federal approval given at some point in time for the progressing of the subcontract or sub-structure contract?

A Yes. Also the demolition contract I mentioned, we sought and were given approval by the Federal

Highway Administration. This is the normal procedure we go through to get -- to qualify for Federal funding.

THE COURT: When was that approval given of the demolition contract?

THE WITNESS: I've got to search for that --

MR. DALES: Perhaps I could help, your Honor, my records indicate it was the 24th of May, 1972.

THE WITNESS: Where do you have that? I have lots of dates and figures here, I can't put my finger on that one.

THE COURT: Are you referring to a particular exhibit, Mr. Dales?

MR. DALES: It is an exhibit that hasn't been introduced yet, your Honor, a Federal exhibit.

THE COURT: All right. We'll get to it later, I'm sorry I asked.

THE WITNESS: It was approved, in any event.

BY MR. DALES:

Q Would you just tell the Court briefly, Mr. Ketchum, what type of approval -- is this PS&E approval?

A That's right.

Q What does that mean?

A PS&E is plans, specifications and estimate, basically, the contract documents that the contractor and we use to construct that portion of the road that's described in the contract documents. Before we can advertise for bids, we have to receive approval from the Federal Highway Administration that they approve those plans and give us permission to go ahead with the advertisement.

Q Now, could you compare the plans you presented for PS&E approval to the plans that would have been available at the hearing in 1965, are they the same plans?

A Essentially the same plans, there is a much greater detail on location. The plans that we showed at the hearings are approximate locations. We stated at the hearing that those were approximate locations.

Q Is there some work that has to be done between the time of the hearing and the time of PS&E approval insofar as the actual design of the contracts is concerned?

A Yes.

Q Would you tell the Court a little bit about that?

A As I say, the maps prepared for the hearing were based on existing maps such as the U.S. Coast Guard and survey and so on and some flat topmatick mapping, it isn't used for design purposes, it's only used for location studies. We must then go out and make more accurate surveys and then detail design involves engineering principals, applications applied to that better information to come up with two things. One, an exact location of the project, the roadway and the real estate necessary on which to build it and also to come up with quantities on which our contractors bid.

Q And, is this --

A This takes quite a long period of time. I think you'll see from the difference in dates here this was the time required to develop those plans.

Q And, does the information that you have gathered between the preliminary plans and the final contract plans -- I'll back off on that -- could you tell me, for example, what it would cost you to build a highway from the plans that you had at the 1965 hearing?

A Oh, yes.

Q Well, would it be a ballpark figure, Mr. Ketchum, or --

A No, we keep accurate records, all of our activities have code numbers and we apply all of our costs to individual projects.

Q But, when you get down to the point where you're asking a hand full of contractors to bid on a job, could they tell from the 1965 plans as accurately as they could from the 1973 plans?

A Not at all.

Q There's not enough detail for anyone to bid on the project back at the hearing time, is that correct?

A That's correct.

Q Was the contract for the sub-structure of this bridge eventually let?

A Yes.

Q When was that, sir?

A This is our contract and there is a letter designation followed by number FASTE, which indicates Federal Aid Southern Tier Expressway, '73-3, the letting date for this project was June 14th, 1973.

Q Now, I refer you to Exhibit -- Appendix K attached to your affidavit, sir, and I ask if there was a final approval date of the contract letting -- I'm sorry, it can't be K, it must be J?

A J. Federal Highway Administration gave approval of our plans, specifications and estimates, these are the documents which go to letting the contractors use these to make up their bids.

Q Now, on Page 4 of your affidavit, sir, you state that the contractor, the sub-structure was awarded July 9th, 1973, is that correct?

A I didn't quite finish my last statement, but the FHWA approved our plans, specifications and estimates on May 9th of 1973. Subsequently, the contract was awarded to the contractor who is now working, July 9th, 1973.

Q And, what is the name of the contractor who was awarded this contract?

A Raymond International.

Q Now, Mr. Ketchum, are you familiar with the current status of the Southern Tier Expressway project in your region?

A I am.

Q Would you tell the Court in as brief a manner as you can, the current status of each of those projects by their designations?

MR. LIPPES: Object to the form, your Honor. We feel

the only section that is in issue is 5-C, what happens over in 5-F has nothing to do with what's happening at 5-C.

THE COURT: Overrule your objection at this particular time, Mr. Lippes, and allow him to testify

MR. DALES: May I say, your Honor, in that vein, we feel that we cannot take one section of this highway out of context. That the entire project, at least the part that is not yet built is very important to the question of whether one section ever gets built or not, we therefore feel it's very relevant --

THE COURT: I'm going to allow it in and I'll make a determination later.

THE WITNESS: You mean I have to confine myself or --

BY MR. DALES:

Q Take it from 5-A through 5-E?

A 5-A, we have just completed there a grading and structure contract. This is the one started at the Pennsylvania State Line, it's about ten miles long and we have a construction cost already spent here, fourteen million plus dollars. The work remaining

here is paving only. That is between the State line and Sherman, New York. 5-B extends from Sherman, New York to Stow. On this project, we have acquired the right of way necessary for construction. We have demolished the buildings and that is where the project stands at the moment. C, which is the bridge contract and its approaches extends between Stow and Bemus Point. We have on-going contract activity, a contract here with the aforementioned Raymond International. This construction contract is approximately twenty percent complete in dollars. You will recall this is for the sub-structure and the approaches, grading and structures only. Section 5-D, we have acquired the property --

Q. Let me stop you a moment, where does Section 5-D begin and end?

A. Section 5-D begins at Bemus Point and extends to Strunk Road, just northwards of Jamestown. At this point it connects with a completed section of the Southern Tier Expressway.

THE COURT: How long in miles is that 5-D?

THE WITNESS: A good five miles. We own that right of way, the real estate necessary for

construction, and we have demolished all of the buildings. We have done no additional work other than we have prepared all the plans, specifications and estimates. I'm sorry, we have received bids on that, we had a letting, most recent letting on that was October 4th, 1973, and we are in the process of awarding that to a construction contractor.

BY MR. DALES:

Q For the completion of the road or some preliminary contract?

A No, this is, I think it includes everything, yes, this is a complete contract, pavement and all. So, when it's completed it can be open to traffic. The next section, 5-E, begins at Strunk Road and goes easterly to approximately the Community of Falconer, Levant, somewhere, this contract is completed and open to traffic.

Q And, how long a distance is that latter extension, Mr. Ketchum?

A Again, about five miles for comparison purposes.

Q And, briefly, could you tell us the status in Region

6?

A. In Region 6, I think I -- if I might go to the Exhibit S-1 again?

THE COURT: Surely.

THE WITNESS: In Region 6, which extends from the Allegany-Cattaraugus Line to the Tioga-Broome County Line, again it's either completed or under construction. It's from the Cattaraugus-Allegany County Line, the only remaining activity is underway now, and that is a paving contract. That extends from that county line over to Almond, New York. From Almond, New York, easterly, I believe it's completed and open to traffic.

BY MR. DALES:

Q. Now, did we leave out any section in Chautauqua County from the end of 5-E to the county line?

A. Oh, yes, yes.

Q. What is the status, just generally of those sections and how great a distance does it cover?

A. I have to put thoes together by letters. I think that would be the easiest way.

THE COURT: In Region 5 or 6?

THE WITNESS: That is in Region 5. I ended with Section E. Section F, G, H, J, K and L are completed and open to traffic.

BY MR. DALES:

Q. How great a distance does this cover, Mr. Katchum?

A. That is on the order of twenty miles, I believe eighteen to twenty miles. I get the feeling I'm wrong, it's more closely thirty miles.

Q. If you know, the best of your knowledge?

A. Anyway, you have the geographic limits and that takes us to Salamanca, the west city line of Salamanca. From Salamanca to Allegany, we have the contract plans virtually complete. There is no activity right there now, we're negotiating with the Seneca Nation of Indians for real estate on which to build that section of the expressway. From the next section, that is from Allegany to approximately the north city limits of Olean, this is complete and open to traffic. From the north city line of Olean and to Cuba, the grading and structures are completed. We presently have a paving contract underway which would complete that section.

THE COURT: What section is that again?

THE WITNESS: That would be R and S, two sections, Olean to where the southerly terminus of S. I used the Cattaraugus-Allegany County Line, that is approximately, actually it's just north of Cuba, New York. We ran over into Region 6 a little bit for convenience.

THE COURT: All right.

BY MR. DALES:

Q. Mr. Ketchum, are you familiar with the cost to the State to date of the construction on the Southern Tier Expressway in Region 5?

A. Yes, I am. The approximate total cost we have invested to date is on the order of a hundred and eighty-eight million dollars. This includes preliminary engineering.

Q. Are you able to break that down by preliminary engineering costs, by construction costs, and by right of way costs?

A. I am. The preliminary engineering costs are approximately nine point three million dollars.

Q. And, briefly, what do you mean by preliminary

engineering costs?

A. This is preparation of the plans, specifications and estimates that I spoke of in those contract documents.

Q. How far back does this preliminary engineering cost take you in terms of State involvement of monies?

A. From the hearing, essentially November of 1965.

Q. Please continue.

A. The construction cost, Region 5 again, a hundred fifty-six million dollars. Real estate acquisition cost, twenty-three point four million dollars for a total of one hundred and eighty-eight point seven million dollars.

Q. Do you have knowledge of the same respective cost that were incurred in Region 6?

A. I do. In Region 6, that is the portion of the Southern Tier Expressway from the Cattaraugus-Allegany County Line again to the Tioga-Broome County Line, preliminary engineering, thirteen point seven million dollars, construction, two hundred twenty-eight million dollars, real estate acquisition costs, thirty-four point two million dollars, for a total

of two hundred and seventy-five point nine million dollars.

Q. What was the total cost to date then for the Southern Tier Expressway?

A. Add those two figures together and you get four hundred and sixty-four point six million dollars.

Q. Do you have available to you, Mr. Ketchum, a breakdown of the costs about which you testified that relate to the specific sections in particular, sections 5-A, 5-B, 5-C, and 5-D?

A. Yes, I do.

THE COURT: Are those spent or estimated?

BY MR. DALES:

Q. Those are completed expenses.

A. You mean what has been done or --

Q. What has been spent to date?

A. Again, I would like to address myself to 5-A, B, C and D. On 5-A, I don't know how much breakdown you want, but I have a total figure here for preliminary engineering, grading and utility relocations, I have an estimated cost of paving, I'm not sure I have the numbers arranged just the way you --

Q. I don't want any estimated costs at this time, Mr. Ketchum, just expenses the State has incurred to date on those specific sections.

A. Okay. 5-A, approximately fifteen million dollars.

Q. And, what does this consist of, if you know?

A. Well, I mentioned the fact that we have acquired the property, done preliminary engineering, we have acquired the real estate. We have had a construction, fourteen million dollar construction contract for grading and structures and this is about the point we leave it at right now, that is about fifteen million dollars to date.

Q. 5-A is the point from the Pennsylvania Line to Sherman?

A. Yes, the Pennsylvania State Line goes to Sherman.



THE COURT: Out of those fourteen million dollars, are the structures completed?

THE WITNESS: Up to the amount of -- yes, up to the work I described, it's complete. We have to get the paving but --

THE COURT: To the extent of fourteen million dollars?

THE WITNESS: Fifteen million, the construction is going on and structures was the fourteen million. There's a total of fifteen million dollars.

THE COURT: All right.

THE WITNESS: 5B, again from Sherman to Stow, we have -- that is the one where we've done preliminary engineering, we, we've acquired the real estate, demolished buildings, we've invested one point five million dollars to date. 5C, that is the bridge, which is presently under construction. Again, we acquired the real estate and the contractor is at work and has done approximately twenty per cent of the work and the best information I have had is about four point seven

million dollars worth of work complete there.

THE COURT: Twenty per cent of the work done by the contractor, do I understand that is just this preliminary contract on the completed structure?

THE WITNESS: No, this is, this is a contract that is in force which is the substructure only. It's only the substructure contract. And, he has done twenty per cent of that work as of this date. But the total activity up to this time which includes that twenty per cent is four point seven million dollars.

BY MR. DALES:

Q. This figure includes the right-of-way, acquisition costs, preliminary design?

A. Yes, as well as the amount we paid the contractor to date that he's entitled to.

Q. That is taken into --

A. He has done that much work.

THE COURT: What percentage of the entire bridge construction has been done to date?

THE WITNESS: Ultimately with all costs we estimate that this will cost just a little less than thirty million dollars for Section 5C.

BY MR. DALES:

Q. Perhaps I can clarify this a little bit, Mr. Ketchum, are there certain costs incurred by the contractor, starting up a section such as this, a contract such as this that are not necessarily over the contract?

A. Oh, that's right.

Q. And, what might some of these be?

A. Okay. I -- but I want to make sure that everyone understands that the figures I gave is if everything went ahead normally and at this time the estimated total cost would be a little bit less than thirty million dollars. At the present time, certain items of the contract are contingent upon, for example, mobilization item, once you get a certain portion of work complete, he's entitled to a block of money, this helps him.

Q. What is mobilization represented in terms of what the contractor has to do?

A. I was just about to get into that but it's very difficult many times for a contractor to get enough cash to get a project started. And so, we want to except this from other items of work, if we have overruns or underruns on a unit basis, that is a cost of the work. This is basically overhead items that he would have in the past used to spend over all the items and we pull that out and make a mobilization item and once he completes, I think, about ten per cent of the work, he gets a block of money to work with.

Q. What do you mean mobilization?

A. This gives him sufficient funds to get his equipment on the site.

Q. What equipment are you talking about, Mr. Ketchum?

A. Well, this, this item, it would be an engineer's office, his own office, move his people in that he brings with him, gets them to the site so they can begin work.

THE COURT: Are you saying if he's completed ten per cent of the work, he may have received twenty per cent of the money?

THE WITNESS: No.

THE COURT: The money is ten per cent of the work he actually completed?

THE WITNESS: Yes.

BY MR. DALES:

Q. Are there some estimates of equipment plus?

A. Not in that item, you're referring to another item which is furnishing for pile driving equipment that he has to get, he has to bring this equipment on the job, he brings that equipment on the job and he does not have to do one bit of work and we pay him, it's a block of money to cover that expense, that also takes care, I think, of him taking it away, but we pay him a certain amount of money to furnish the equipment.

Q. Do you have a figure on that?

A. I'm not sure. I had this broken out, I think --

THE COURT: Is that part of the four million dollars which you previously mentioned?

THE WITNESS: I think that's included, if I could -- Bill, is that included in the -- yes, that is included in mobilization and the furnishing of the equipment is included in the four point seven million

dollars.

BY MR. DALES:

Q. What about 5D, Mr. Ketchum?

A. 5D, this is the piece, the section of the Southern Tier Expressway from Bemus Point to Strunk Road. We have received for this work -- we are in the process of awarding this contract to the low bidder.

Q. What about your cost to date, your expenses?

A. Cost to date includes preliminary engineering, preparation of plans, estimates and specifications, real estate acquisition, demolition of buildings, and we have spent to date one point three million dollars.

Q. Now, Mr. Ketchum, at my request, did you cause a search of the regional office records to be made to ascertain what if any steps have been taken to inform the public either formally or informally of the project that we're concerned with?

A. Yes, you did and I have.

Q. All right. May I state, your Honor, that is S7. Would you describe the document that is referred to as S7, briefly, Mr. Ketchum?

A. Exhibit S7 contains copies of materials that we kept

on file of letters and memorandums of meetings from the -- just prior to the hearing up to date, discussing the project.

Q. Now, approximately how many meetings were there, Mr. Ketchum?

A. We have a record of approximately twenty meetings or letters of inquiry and responses.

Q. Could you give the Court information of the times when somebody would go to meetings, what caused one of the meetings to be held --

A. Both local interest, request from localities and meetings that we negotiated with local representatives.

Q. And --

THE COURT: You are distinguishing, I assume, Mr. Ketchum, between the public hearing we are talking about in November of '65, as opposed to --

THE WITNESS: Yes, meetings, these are apart from the public meetings.

THE COURT: There was one public hearing?

THE WITNESS: Yes, one public hearing held.

BY MR. DALES:

Q. Could you elaborate on this?

A. Many public meetings, we didn't bar anyone from the meetings, we got a request from a supervisor of a town or county or from mayors of cities, anyone that requested meetings, we would be happy to go out and meet with them and in some instances, we negotiated and asked supervisors who were involved to meet with us and we would explain the status of the project at that time and what we intended to do.

Q. Okay. Could you give us some examples, did you ever speak to local town officials?

A. Yes, on July 8th, 1964, Cattaraugus County Court, we met with local public officials and planning directors. October 13, 1964, we met in Jamestown with a group of eighty officials and approximately fifty local residents. November 10th, again in Jamestown, meeting with local public officials and interested persons.

Q. Is the scope of the meetings documented, I mean, was there a file made?

A. Yes, the same documents you have designated Exhibit S7, we have included both the summary of these

documents and documents themselves that indicate who was there and what was discussed.

THE COURT: These relate to all sections or just 5C or --

THE WITNESS: Essentially 5C. We tried to cull out just things applicable or related to 5C.

BY MR. DALES:

Q. I believe you stated there were approximately twenty such meetings?

A. That's correct.

Q. And, do you know over the period of what time these covered?

A. Yes, I do. As indicated on the summary sheet, that was a period running from July 9, 1964, to December 7, 1972.

Q. Now, is there also included in Exhibit S7 a sheet of newspaper articles?

A. Yes, we routinely clip newspaper articles that pertain to specific projects and keep a file of them. We have such a file and we made copies of them. This is part of this document and they run from February of 1966 to December of 1973, approximately five articles.

Q. And, what papers did they appear in, if you know?

A. Yes. A whole range of papers that are read in the area, the Dunkirk Evening Observer, the Buffalo Courier-Express, West Olean Times Herald, Jamestown Post Journal, a newspaper called the Grape Belt, Tonawanda News, Salamanca Republican Press -- that essentially covers them.

Q. Are there any particular newspaper articles that you think ought to be brought specifically to the Court's attention?

A. I would like to refer in particular to several articles.

THE COURT: Part of S7?

BY MR. DALES:

Q. Yes, they are.

A. Yes, they are. These are numbered Exhibits 6 and 7, Jamestown Post Journal, March 8, 1972, number 69, from the Jamestown Post Journal dated April 4, 1972.

Q. Would you briefly describe what those two are?

A. The first one's an article by Mr. Jack Lloyd entitled, "Whyzzit," spelled W-H-Y-Z-Z-I-T, under the caption Chautauqua Outdoors.

Q. And, who is Jack Lloyd, Mr. Ketchum?

A. He is a local sportsman writer.

Q. Is he one of the plaintiffs?

A. I believe he is, I believe he is listed as one of the plaintiffs. And the second article mentioned was also by Jack Lloyd entitled, "The Bridge Over Chautauqua Lake." An article in the --

Q. Let me just stop you for a moment, Mr. Ketchum, referring you to the second Jack Lloyd article, if you would look at the left-hand column, last paragraph down, sir, is there anything in there of significance to you that treats with the question of an environmental impact statement?

A. Yes, this article states and I quote, "An environmental impact statement has been made and bridge complies. The National Environmental Protection Agency had a cutoff date so the State did a re-evaluation and this has been accepted by the Federal Highway Administration." End of quote.

Q. Is there a date on that article?

A. That is the article that was dated April 4, 1972.

Q. Were there any other articles that were pertinent?

A. Yes, I call attention to Exhibit 75 of the Dunkirk Evening Observer dated September 12, 1972. And,

this refers to --

MR. LIPPES: What number?

THE COURT: Exhibit 75 of S7.

THE WITNESS: This article refers in particular to a full-page ad that was printed in some of the local papers.

BY MR. DALES:

Q. And, do you know whether that ad is available?

A. Yes, we have that ad available, I think that particular one is from the Dunkirk Evening Observer.

Q. That is Exhibit S8, your Honor.

A. That was.

Q. What was the content of that ad, if you can describe it?

A. The headline of that article was, "Stop the Bridge to Nowhere." And was in the issue August 21, 1972. That headline took about half of the page.

Q. Do you know who sponsored the ad, Mr. Ketchum?

A. It's indicated, I would be happy to read it.

THE COURT: Is it in evidence?

BY MR. DALES:

Q. Yes. I might point out that originally three of the plaintiffs sponsored the ad and one of the

plaintiffs has since withdrawn, the Audubon Society has withdrawn from the litigation.

A. And, I draw your attention to one more article, if I may, in particular the Grape Belt article, page -- or Exhibit 76 of September 13, 1972.

Q. Now, may I ask you, Mr. Ketchum, of these 75-odd newspaper clippings, are all of them for the bridge or all of them against the bridge?

A. Oh, no, it's mixed, it's a complete collection, no matter what the viewpoint expressed. They all relate to the bridge, they're on all sides of the question.

Q. You stated, I think, they cover the period from 1965 to present?

A. Yes.

Q. Now, with respect to Section 5A and 5B, Mr. Ketchum, was any type of public notice given with respect to those two projects?

A. In our hearing prccedure, what we do is offer an opportunity for public hearing and this was done for Section 5A and 5B.

Q. Mr. --

A. And legal notices were published in the Jamestown

Post Journal and the Chautauqua News, on November 18th and 25th of 1965.

Q. I show you Exhibit S9 for identification and ask you if you can identify that?

A. Exhibit S9 includes the correspondence indicating that we have complied with various Federal requirements with regard to public notice offering an opportunity for a hearing.

Q. And, would you explain a little bit, Mr. Ketchum, what this means, why do you have to have a public hearing?

A. The procedure we go through, if we decide we have to hold a public hearing, I mean, if a public hearing is requested, then we do just that.

Q. First, are you required to advertise?

A. Oh, yes, that is why I say in following the Federal procedures that we were in fact at that time, yes, we had to avertise and offer an opportunity to request a hearing, this we did and this document indicates that we did just that.

Q. Does that indicate the dates of the advertisement?

A. It does.

Q. And newspapers that it was advertised in?

A. Yes, it does.

Q. And, does it document the Federal responses to this or the application for Federal approval of this procedure with respect to these two sections?

A. Well, as I say, it refers to those requirements of the -- of the Federal Highway Act that requires us to publish those notices and publish but I don't find anything in this packet indicating that. We certainly have the approval to go to these hearings from the Federal Highway Administration?

Q. You were required, were you not, to advertise?

A. Yes, we complied, right.

THE COURT: You're required to advertise a public hearing can be held?

THE WITNESS: Request, if requested.

BY MR. DALES:

Q. Were requests received?

A. None were received, this packet simply includes a letter to the listed people describing the fact that we have published a legal notice and the objective of this public notice, but that's part of the record.

Q Who are those people that it's addressed to?

A. This letter was sent to the local senator, assemblyman, the supervisors of the affected towns, the chairman of Chautauqua County Board of Supervisors and the mayor of the one village in that section.

Q. As a result of this procedure, I gather no hearing was ever held with respect to 5A and 5B?

A. No formal hearing prior to or -- along about this time, we did have a meeting with elected officials in the area and described the whole project to them.

Q. Is this a densely populated area?

A. It's not, it's a rural part of the state.

MR. DALES: I offer Exhibit 5S in evidence, your Honor.

MR. LIPPES: One objection, your Honor, for the same reason, it applies to 5A and B, not C.

THE COURT: I overrule your objection and I'll allow it in for what it might be worth.

MR. DALES: That's S9, not S5, yes.

THE COURT: Mark S9 in evidence.

(Whereupon, Exhibit S9 for identification was then received and marked Exhibit S9

in evidence.)

BY MR. DALES:

Q. Mr. Ketchum, are you able to tell the Court over what period of time the right-of-way was acquired for project 5A through 5D?

THE COURT: Through D?

BY MR. DALES:

Q. D, just the four sections from the Pennsylvania line to Strunk Road?

A. Yes.

MR. DALES: Your Honor, this might be an appropriate place for lunch, I understand Mr. Lippes has an appointment at one o'clock, and I certainly would have no objection.

THE COURT: What time do you want to resume, two o'clock?

MR. LIPPES: Two o'clock will be fine.

MR. DALES: Two-thirty will be better, your Honor, if Mr. Lippes has no objection. This is going a lot faster than I had anticipated and I could certainly use a few minutes more with Mr. Ketchum, so if

two-thirty isn't going to offend anybody --

THE COURT: All right. Let's make it -- we'll adjourn until two-thirty.

(Whereupon, a luncheon recess was then taken.)

(Proceedings taken after luncheon recess, commencing at 2:35 P.M. Appearances same as before noted.)

THE COURT: May I remind you, Mr. Ketchum, you're still under oath?

THE WITNESS: Yes.

THE COURT: Resume your stand.

MR. DALES: May I proceed, your Honor?

THE COURT: Surely.

BY MR. DALES:

Q. Mr. Ketchum, when I asked you a question over what period of time the right-of-way had been acquired in connection with 5A, B, C and D --

A. Our records indicate the right-of-way activity started on these dates for Section 5A, we started in August of 1968, and when I say started, this means soon after we have some idea what property is required, this is after a survey and some

preliminary design work and all real estate people start their evaluation. This means initially a physical inspection of the property and the buildings to be taken to develop their appraisal and the cost of acquisition. As I say, on 5A, this was begun August of 1968. 5B, August of 1969. 5C, October of 1969. And 5D, January of 1969.

Q. All right. Am I correct, Mr. Ketchum, that the property for highway use in New York is appropriated pursuant to Highway Law Section 30?

A. That's right.

Q. Could you tell the Court briefly what that means in law terms?

A. As far as we're concerned, we prepare a map indicating the property necessary for construction for each property owner and the type of use to which we intend to put it. If there's a question if it's needed for construction, there is a complete appraisal and I trust its acquisition of property for construction.

Q. For the actual right-of-way?

A. Property we will occupy.

Q. For construction?

A. For real estate right-of-way purposes.

Q. Now, there might be some other parcels that you would take the temporary easement on?

A. That's right. Once we have these maps, our real estate people begin their title search activities and we eventually come to a point where we are prepared to take possession of this property and this is done through several steps. The initial step is filing of the map with the Secretary of State in Albany. This gives us the right of entry but we do not usually enter on the property at this time. The time that we take possession of the property resolves around filing of this map in the County Clerk's Office of the county in which the project is located.

Q. Does that filing of the map in the County Clerk's Office have any special significance under Highway Law 30?

A. It does, this is the point in time that we take possession of the property, take title to the property, resolve title, I think, is the term.

Q. Do you know, Mr. Ketchum, how many parcels were necessary to be appropriated for each of the four

sections that we have been talking about?

A. Yes, I do. Beginning in alphabetical order, on Section 5A, we required thirty-eight parcels or property. 5B, ninety-five parcels. Section 5C, we needed sixty-three. And 5D, a hundred and forty-two. Altogether, that is three hundred and thirty-eight parcels of property.

Q. Do you know also, Mr. Ketchum, how many buildings were acquired on those three hundred-odd parcels?

A. Yes, I do. There was a total of two hundred and forty-four buildings over the four sections. Fourteen buildings on 5A, ninety-six buildings on 5B, fifty-nine buildings on 5C and seventy-nine buildings on 5D.

Q Now, what can you tell us with respect to the number of families that had to be relocated on each of those parcels or each of those sections?

A. Those buildings represented a removal of seventy-one families. Five from Section 5A, twenty-two families had to move away from Section 5B, twenty families on 5C and twenty-four families on 5D.

Q Now, were there any businesses affected on these four projects?

A. There were none on 5A, one business on 5B, one on 5C and four on 5D, a total of six business properties.

Q. And were these people actually relocated?

A. Oh, yes, yes.

Q. Now, during the spring of 1972, Mr. Ketchum, did anything occur with respect to project 5C?

A. I think you're referring to our demolition activity in early 1972. We initiated procedures for two demolition contracts, one on the west side of the lake and one on the east side of the lake encompassing Sections B, C and D. We asked for and received PS&E approval from the Federal Highway Administration to go ahead on May 24th, 1972, and those projects were let, that is, we received bids for demolition in June of 1972, and all the work was completed in August of that same year, 1972.

Q. Now, Mr. Ketchum, I show you Exhibits S10A and B for identification and ask if you can identify those documents?

A. Yes, those are the contract plans to the contractor of which buildings we wanted removed in this

demolition contract that I just described.

THE COURT: Could I have the exhibit numbers again?

BY MR. DALES:

Q. S10A, your Honor, and S10B, for identification. Were both of these contracts eventually awarded, Mr. Ketchum?

A. Yes, they were, as I indicated, work -- I have jumped ahead of you a little bit, work was completed, the demolition was completed by August of 1972.

Q. Now, can you tell the Court how many buildings were included in each of these contracts?

A. The demolition contract on the west side of the lake called for removal of forty-three buildings.

Q. When you say contract on the west side of the lake, is that A or is that B, 10A or --

A. This is B and that portion of C on the west side.

Q. I'm trying to key you into the exhibit number, Mr. Ketchum. There is two exhibits --

A. I'm sorry.

THE COURT: 10A or 10B?

THE WITNESS: 10A.

BY MR. DALES:

Q. That is the west side?

A. The west side of the lake and it includes Section 5B and that portion of C on the west side of the lake.

THE COURT: Near Stow, is that right?

THE WITNESS: That's correct, on the Stow side.

BY MR. DALES:

Q. Would this be approach ramps to it?

A. Includes approach ramps right up to the lake shore.

Q. Right up to the lake shore?

A. To the lake shore.

Q. And, how many buildings were demolished?

A. Forty-three buildings in the entire contract.

Q. What about S10B, Mr. Ketchum?

A. S10B is the demolition contract for the east side of the lake and encompasses that portion of C on the east side of the lake and Section 5D.

THE COURT: Bemus Point side?

THE WITNESS: Bemus Point side, yes.

BY MR. DALES:

Q. How many buildings were demolished pursuant to that contract?

A. Thirty buildings were demolished.

Q. Now, where were these buildings located, Mr. Ketchum, on the respective contracts?

A. They were distributed over the entire length of each of the contracts as described but the bulk of them were along the lake shore, most of them on the Bemus Point side. As I indicated, there is a few more on the Stow side, if I recall correctly.

THE COURT: I think you said forty-three on the west and thirty on the east?

THE WITNESS: But in both cases, the majority of the buildings were at or near the lake shore.

BY MR. DALES:

Q. All right. Were there other buildings razed during this same period of time?

A. Yes.

Q. And, who performed this function, Mr. Ketchum?

A. We asked our own maintenance forces to demolish some of the buildings which they did and there are a few buildings remaining which is included in the construction, various construction contracts.

Q. How many total structures were razed?

A. Two hundred and forty-four, that's the figure that I mentioned earlier, two hundred and forty-four structures altogether. As I say, those are two contracts only and we should deduct ninety-six from that to get a comparison.

THE COURT: Ninety-six or fourteen from that?

THE WITNESS: Thank you, fourteen.

THE COURT: All right. Two hundred and thirty buildings actually acquired and demolished in B, C and D?

THE WITNESS: That's correct, seventy-three of those were done in this demolition contract.

BY MR. DALES:

Q. All right. Now, is there shown on Exhibit S10 the location of the buildings that were to be demolished?

A. Yes.

Q. Can you tell the Court what page of the exhibit that appears on?

A. Well, that is the document that addresses itself primarily to the location of the buildings and that is the bulk of the document.

THE COURT: Is this one of the exhibits in evidence?

MR. DALES: This is not in evidence, your Honor. I'm

so attempting to lay a foundation for it.

THE COURT: All right.

THE WITNESS: Yes, this is the large scale plan that shows the locations of the buildings to be demolished and it's included on S10A from sheet 4 to sheet 15. And, on S10B, the buildings to be demolished are indicated on sheet 3 through sheet 11, the last sheet in the plans.

BY MR. DALES:

Q. Are these contract plans a part of the public records of your office?

A. Oh, yes.

MR. DALES: I offer them in evidence, your Honor.

MR. LIPPES: Same objection, your Honor, as to those portions of the plans that do not cover extension 5C.

THE COURT: Overruled. Mark them in evidence, please.

(Whereupon, Exhibits S10A and S10B for identification were then received and marked S10A and S10B in evidence.)

BY MR. DALES:

Q. Mr. Ketchum, could you briefly describe the type of buildings that we're talking about in the demolition contracts, particularly in the area of Bemus Point and Stow?

A. The bulk of them are summer homes and cottages in and around the lake shore. Some of them are permanent residents, others are outbuildings, they aren't all residences. I think if you compare the number of families with the number of buildings you will not have a family in every building.

Q. Were they in close proximity to the lake?

A. This indicates that the bulk of them are at or near the lake shore.

Q. Would they be visible from the lake before they were razed?

A. Oh, yes.

Q. Would they --

A. They're shoreline properties, many of them.

Q. Would it be apparent to a passerby on the lake after they're gone, they're missing?

A. Yes.

Q. Would there be scars to the earth of some contracts?

A. Immediately after demolition, yes, that is true.

Q. And, would these also be visible from the roadside?

A. Right nearby, yes, certainly.

Q. And, I believe you stated that all of the buildings were down by the 20th of August, 25th of August, 1972?

A. I did, all buildings down by the 25th.

Q. Did your office, Mr. Ketchum, maintain any facilities in the area for the relocation of the people that were affected by having their property taken?

A. Yes. One of the services we provide and this was indicated at the public hearing, we'll give relocation assistance to people that need to be relocated because of the construction. To assist the property owners in this light, we had, we opened a relocation opposite Bemus Point and this was an operation, we had one or more real estate people to answer questions and assist in any way we could as called for under Relocation Service from December 1970, until March of 1973.

Q. Would there have been a prominent sign on the building?

A. Yes, there would.

THE COURT: When in 1973?

THE WITNESS: March.

THE COURT: All right.

BY MR. DALES:

Q. Mr. Ketchum, at my request, did you cause a search of your office records to be made to ascertain whether there was any correspondence relating to request for information about environmental impact statements?

A. Yes.

Q. Was there any such correspondence?

A. Yes, we did find such correspondence relating to that question subject.

Q. Your Honor, that is Exhibit 11 that we have stipulated to, S11 in evidence.

THE COURT: in evidence?

BY MR. DALES:

Q Yes, in evidence. And, do you know, Mr. Ketchum, without looking, you don't have this in front of you?

A. Yes, I have a copy.

Q. Do you know the period of time that this covered?

A. Yes, I do.

Q. Was it from the time of the hearing up until the present?

A. Oh, yes. Between those two dates -- I'm looking to make sure this is chronological order, I'm quite sure it is, this covered a period from February 28th, 1972.

Q. I have on the front page here, Mr. Ketchum, a letter dated March 17, 1966, to the then district engineer from the Chautauqua County Federation of Sportsmen, Inc.

THE COURT: Why don't you show him the original exhibit as marked?

THE WITNESS: Yes, I don't have that one. As indicated in the Exhibit S11, this covered a period from March, 1966, to and including March 11th, 1972.

BY MR. DALES:

Q. Am I correct, Mr. Ketchum, that this does not include those pieces of correspondence that would have dealt with request for information, additional hearings and so on?

A. That's correct.

Q. All right. Were you also furnished with copies of

correspondence that had been received by the Department of Environmental Conservation in connection with the same subject of environmental impact statements?

A. Yes.

Q. Your Honor, that is 12, that is in evidence.

THE COURT: Is that a State or Federal department?

BY MR. DALES:

Q. That is a State Department of Environmental Conservation. Mr. Ketchum, do you have that group of correspondence in front of you?

A. I have the one you just gave me, S11. I'm not sure I have the other one, if I could -- yes, I have that.

Q. Is one of the letters in that packet from the --

A. The letter packet S12?

Q. Is one of the letters in that packet from the plaintiff, Chautauqua County Environmental Defense Council, one of the plaintiffs?

A. Yes, this was from the Chautauqua County Environmental Defense Counsel.

Q. And, what is the date of that, Mr. Ketchum?

A. Dated September 30th, 1971.

Q. And does it request information with respect to the environmental effect of building 5C?

A. Yes, it does. It asks about construction specifications but also the ecological matters, siltation, water quality standards, et cetera, et cetera.

THE COURT: Does that exhibit contain an answer to that letter?

THE WITNESS: Yes, attached to it, let me make sure of this. The next letter in that packet dated October 14, 1971, is an answer and response to Mr. Corten's letter. Chautauqua County Environmental Counsel dated September 30, 1971, is signed by one Daniel F. Corten.

BY MR. DALES:

Q. Are there any names that appear on the letterhead of that letter from the counsel?

A. Yes, two names. Robert Boenig, the other is Royal Steubing, from Jamestown Community College.

Q. I gather he is a first-name plaintiff in this lawsuit?

A. Yes, first-named plaintiff in this lawsuit.

Q. Now, Mr. Ketchum, since the institution of this

litigation, have there been any steps taken with respect to the 5C project?

THE COURT: This action was commenced November 23rd?

MR. DALES: Well, I received -- our office, your Honor, received notice on November 23rd, I believe.

THE COURT: What is the date of the filing of the order to show cause?

MR. LIPPES: The 23rd, I believe.

MR. DALES: I don't think we received it until --

MR. LIPPES: It was filed the 23rd.

THE COURT: All right. Let's start from November 23rd, if you can answer the question, Mr. Ketchum.

BY MR. DALES:

Q. Our first notice of this was the 30th of November, but it really isn't that pertinent.

A. To answer your question, yes, we, noticing that this action was underway, we had to make -- and the fact that we had ongoing construction contract where the contractor has to plan and execute work daily, a number of decision had to be made with

this court action in mind. So, we did permit him to go ahead in certain areas but there were other areas where we asked him to hold back. It meant a commitment of a large number of dollars if we let him proceed.

Q. Can you be more specific in that regard, sir?

A. Surely. He continued to work and is still continuing to work on several -- in several areas. One is earth work operation on the Bemus Point side where we called for the construction of a shear key, this is something made of earth, what we're doing here is removing some of the unsuitable material, material that will be unsuitable under our earth embankment approaches to the bridge.

Q. You're saying it wouldn't hold the weight of the embankments?

A. That's correct.

THE COURT: Is this S-H-E-A-R and K-E-Y?

THE WITNESS: Yes, and the purpose of this is to provide a foundation and stability for the earth work that follows and it's constructed adjacent to the end of the

bridge. This is quite an extensive procedure. We are doing some dredging work, continuing some dredging work on the Bemus Point side. Part of the dredging is being done from barges on the sides. Other work is being done along the sides and the contractor wants to work from the barges, and it's not readily available to floating equipment, so he had to dredge a canal into the site.

BY MR. DALES:

Q. In that connection, are there any special steps taken to protect the environment?

A. This is one of the great concerns to the people who felt this would be detrimental to the lake. We talked with several people about their concerns and we did make provisions to minimize the disturbance. We caused, we included in our construction, protection against any degredation of the lake.

Q. How was this accomplished?

A. This was done by the dredging operation, involved

digging up the material from the lake bottom and pumping it over onto the shore, rather than pumping it out into the lake and this keeps the siltation, the clouding of the water, muddying of the water, let's say, from occurring by doing it in this fashion.

Q. Any requirement on the quality of the water that is pumped back?

A. No water involved in this operation can return to the lake unless it's in Class A condition which is drinking water quality.

Q. Was this one of the suggestions made by the Department of Environmental Conservation?

A. I'm not sure of the source of this concern, they were involved in the discussion.

Q. Is this a new procedure as far as the State of New York is concerned?

A. Well, it was a special requirement for this contract and we have it in all of our contracts now, the protection of flowing streams. So, we don't contribute to the siltation of the creek. We have silting basins where we collect all this material that may be detrimental to the natural

streams.

Q. I'm sorry, I interrupted you, continue with what you started.

A. Yes. The contractor is manufacturing concrete piles in a plant in Virginia. Now, these piles are the ones that are used in the mainstructure out in the lake. It's a three-foot diameter, wholly concrete pile that is manufactured in far as casts of concrete, it's in sixteen-foot lengths, I believe, and they put these lengths together to the total desired length needed. Then we put them in a tensioning process where we feed wire through it, through the end of this thing and tighten them up to make it all one piece. And, those are on the order of a hundred and sixty feet long. This manufacturing is going on now. The contractor is proceeding with and did finish some of the work of driving several piles, that is, I'm sorry if I get technical here, if anything happens where you don't understand --

THE COURT: Don't worry.

THE WITNESS: Drive support piles into the abutments in the land piers. We have driven our

first test pile in the length now in the lake. A test pile is one that we drive to determine what length the piles should be manufactured in this plant in Virginia. We don't know until we drive the first pile, we don't know exactly what length we need. There is a test procedure that we go through to determine this piling has been driven to the proper depth and has proper strength value. We actually apply weight to this pile to see if it can sustain the designed load as a safety factor. We expected to do four more of these test piles. The purpose of this, as I said, is to determine the lengths that have to be manufactured in Virginia. The intention here is to manufacture these necessary piles during the winter and have them delivered and then next spring and summer, put them in place. If for some reason or other they, in the event he was delayed, this could

upset his schedule quite dramatically.

BY MR. DALES:

Q. Could you tell us to what extent it could be upset?

A. Yes, it would upset his schedule by at least a year. If he doesn't manufacture them this winter, and place them next summer, it reschedules the whole thing in a similar fashion onto the next year. He would have to manufacture this summer and into next winter before he could have the piles available to place.

Q. Is there any --

A. Now, that is work that he is going on, ahead on. Now, we have asked him to hold back on other work because it means quite a commitment to both the contractor and the department, so he has either voluntarily withheld this activity or we have asked him not to start certain parts of the work and I have a list of these such as driving pipe piles in an abutment and piers on the west shore. We haven't started over there at all. Driving of H piles, that is a different type of pile support, where abutment is three and five on the east shore. Those are smaller structures inland from

the lake. Part of the construction project but not part of the main structure. The casting of the prestress concrete girders for similar bridges, this is something that is done remote from the site. He has not started these and this gets to be very critical if they haven't been delivered at the right time. Purchase of the floating form material for the lake pier footings, this is at each of the piers in the lake just below the water level at specified depths below the water level. The structural pilings are tied together with a block of concrete and this will be formed and cast underwater at the site. He would have to purchase this material especially, it's very unique design. He has not started the design of the pier forms, that is the rest of the forms immediately above the water. He has not, he has an opportunity to purchase right now fifty thousand dollars worth of structure reinforcing steel and he is hesitating to commit himself on that reinforcing steel. If he had no concerns about his schedule, he would snap this up because bar reinforcing is difficult to come by, right

now, delivery dates are unsure. The casting of the pier for the pile sections which I mentioned, he's holding off a little bit on those but he wants to get up to full production by February 1. We have some prestressed pile sections that have been manufactured. They have been shipped by waters as far as Newburgh, New York. This is his shipping procedure, to come up from Virginia to Newburgh, New York, by water, then overland by truck to the site. He has manufactured and delivered to Newburgh, New York, eleven prestressed pile sections, and there they wait. He's chosen not to bring them to the site at the moment. So, it's affecting his work schedule quite seriously.

Q. Mr. Ketchum, have you any estimates of the cost that would be incurred by the State where the work to be suspended on this project for let's say a seven month period?

MR. LIPPES: Object to that, your Honor, I don't know what he's basing this on, I don't know if he has or if he is in a position to state that.

THE COURT: Why don't you ask other questions before you get into an all-inclusive question like that?

BY MR. DALES:

Q. All right. Mr. Ketchum, at the time this lawsuit was commenced, did I request through your department counsel that a statement be made of what our possible exposure was moneywise as a result of an injunction being granted at that time? Were you asked to prepare such a report?

A. Yes.

Q. And, did you go about the procedure of having such a report made?

A. Yes, this was prepared and we lifted -- asked the contractor to see what activities, and listed what

would be affected if we stopped work at that point, suspended work for the next seven months.

Q. And --

A. The reason for the seven months was basically from that point until the spring or summer started up when he would be in full construction activity again.

THE COURT: Run from when, November until May?

THE WITNESS: Approximately.

MR. DALES: First of December to the first of June or end of June, I guess.

THE WITNESS: Right.

BY MR. DALES:

Q. Was this report prepared under your supervision?

A. Yes, it was.

Q. And, did you reach a conclusion as to the projected cost to the State of having to shut down for this period of time, did you reach such a conclusion?

A. Yes, we did.

Q. What were the basis, what factors went into reaching this conclusion?

A. We felt that the following activities would be affected, such things as project maintenance and overhead, even though he's not working on the site

he had some responsibility to keep it in a safe condition as far as the people living and working in the area were concerned. The escalation cost of labor, were he prevented from working, the cost of doing the work would go up during this period and he would have suffered under this arrangement. The same escalation price to materials and equipment rental. There is a complete cost revolving around the additional seven months of rental in order to keep the equipment that he was using ready and available for him but not in use and earning money would have amounted to another amount of money. I'm staying away from the dollars, is that all right?

THE COURT: I'm interested in how you're arriving at this and we'll get into the question of money later.

THE WITNESS: Okay. There is an extra closing down and starting up cost. Every contractor experiences a cost just to start up, to open up the doors, to get heat, oil for his offices. Fencing around the area, signs, cleaning up the signs, whatever is necessary to get the site in as

safe a condition as he can make it and start work and when I say safe, that is for his own employees and the public. The same thing occurs when you close down, and this is a cost to him. He has obligations with subcontractors, he has contracted with them for a certain period of time to do a certain amount of work. And, if he has to let these men go away for seven months, he is liable for whatever extra costs are involved in delaying that work when he calls them back. These are the items that we analyzed and we have been able to come up with a price for each of these.

THE COURT: Do I understand this is a figure which you feel you have is the cost, the additional cost?

THE WITNESS: That would be the additional cost above and beyond the present contractural obligation.

THE COURT: With no extras on it?

THE WITNESS: No extra work involved other than the

extra closing down and so on that I mentioned.

BY MR. DALES:

Q. Are those costs that you just described, Mr. Ketchum, relating totally to Raymond International, Inc.'s operation?

A. We have a contract with what we call the prime contractor, which is Raymond International.

Q. Is this figure that you came up with those conclusions are those damages that are suffered by Raymond International in the first instance?

A. That's correct.

Q. And, is it your assumption that the State of New York would ultimately be liable for those costs?

A. Yes. However, it filters down with subcontractors and that's not our primary concern, we only have a contract with Raymond.

Q. But the figure you arrived at is what?

A. Includes everything but ultimately it's between Raymond and ourselves, this amount which we would have to pay in damages for the seven months delay.

Q. Assuming we were.

A. Assuming we were handed a decision against us by a

Court of Law?

A. Yes.

Q. Assuming --

A. Maybe it's too gratuitous here, but we think that would be a legitimate claim, were we to tell him to stop work.

Q. At least it would be argueable whether it's recoverable or not, it's a potential liability?

A. Potential liability. In our mind it would be a cost to somebody or the contractor, no matter who was to be liable, the contractor would sustain this cost in any event.

Q. Can you tell us the dollar amounts for each of these categories that you described previously?

A. Yes, I could.

Q. Would you please proceed to do that?

A. Under the project maintenance and overhead item we estimate that is, in round figures, of course, two hundred and sixty-five thousand dollars. Escalation cost, relocated to labor, two hundred and eighty-five thousand dollars, escalation of cost of material expenses and this has reference to fuel, oils, and related costs which changes almost daily,

two hundred and seventy thousand dollars. Escalation cost on equipment rental, ninety thousand dollars. The impact cost of the additional seven months of rental without being able to use it and earnings, four hundred and forty thousand dollars, one extra shutdown of work, forty-five thousand dollars, an extra start up, twenty-five thousand dollars, subcontractors additional expenses, four hundred and sixty thousand dollars, subcontractors additional expenses, four hundred and sixty thousand dollars for a total of one million eight hundred and eighty thousand dollars. We made some basis for these assumptions here, one is the escalation which we figured was one percent a month, which was his figure over the last several years and also that the equipment would stay on the project site.

THE COURT: In other words, not be rented out during that period of time?

THE WITNESS: To someone else, right.

BY MR. DALES:

Q. Now, in this same vein, Mr. Ketchum, did I ask that you cause to be prepared a statement of the dollar cost to the State of New York, if this contract were

to be cancelled and subsequently re-let?

A. Yes, you did.

Q. And, did you make any certain assumptions about that procedure, and would you tell the Court if you did and why you did?

A. All right. Certain of the items we have already paid for would have to be paid again if we stopped work for any length or any period of time. In other words, cancelling this contract and re-letting it and asking another contractor or the same contractor to come back because he might be the low bidder.

Q. Mr. Ketchum, is there any period of time beyond which this Department of Transportation considered they could not keep this contractor hanging without going forward with the job?

A. Well, there was a kind of difference between this one and the previous one I talked about. The contractor could sustain maybe seven months delay and that would be the cost, but if we let it go one or two years, we would feel compelled, I think, or obligated to cancel the present contract and start over again when we were permitted to proceed and this is the basis on which the statement was made.

I mentioned earlier a mobilization item where for example when he gets a certain percentage complete we pay him a block of money. We would -- this would have to be done again because a new contractor is on the site and he would have to move in all of his equipment. There is several other items that are related to the same thing, that we've already paid the present contractor that we could not -- there's no recovery and no benefit, there's nothing there on the ground yet, it's nothing that will remain with the contract, it's just these set up charges that the contractor incurs in getting his equipment there and getting it under motions. And, I have them listed by item now here in our contract which I think is most descriptive of it.

Q. Was this prepared under your supervision and at your direction?

A. Yes, it was.

Q. Would you tell the Court first what these several items were that you considered?

A. We have six contract items. Then we feel there is two others that, it's related work that's not covered under our present contract because we didn't

expect to do them. We have Item 1 M, the mobilization item. We estimate that cost to be four hundred and twenty thousand dollars. Item 6 M, Marine transportation, one thousand dollars. Item 76, maintenance of traffic, this is maintenance of highway traffic on existing roads, either providing detours or signing to make it safe while they drive through the area, thirty-nine thousand dollars. Item 87 PS, equipment for driving tubular piles, this is furnishing this equipment, one million eight hundred seventy-five thousand dollars. Item 87 X, equipment for driving piles, these are smaller land piles, thirteen thousand dollars. Item 116 SX, project survey, eight thousand dollars. Site restoration if we had to close down for a period of time there might be holes in the ground, unsafe conditions that we would have to correct, knowing that there was going to be a delay there with no one from the contractor on the site and he would have to restore it to our satisfaction, the site of the work to our satisfaction, fifty thousand dollars.

Q. Is a shear key also part of that?

A. The shear key that I described earlier is now a hole

in the ground full of water. It's gotten to that point where we're just removing the unsuitable material. We have yet to start putting back the more acceptable material that would have been unsafe to leave. We would have to fill in that hole, that is just one activity. Piling on hand, this is material that has been ordered and delivered that could not -- piling on hand is -- I'm sorry, I have an item here I'm not sure of, frankly.

Q. Your Honor, could I ask a moment for Mr. Ketchum to confer with one of his associates?

THE WITNESS: If I may?

THE COURT: Surely.

THE WITNESS: Thank you, your Honor. We have -- this bridge is unique in design, the piling that's been ordered for the project could not be used any place else. So, we feel that this is a legitimate claim against the job.

THE COURT: Can this be used again?

THE WITNESS: I would think yes, sure, that is why I wasn't sure of this item. So, there's a possibility of some salvage there.

THE COURT: What is that amount?

THE WITNESS: Three hundred and sixty-six thousand dollars. It's a large amount, I'm a little hesitant myself but it could not be used any place else, it's unique to this bridge.

BY MR. DALES:

Q. Do you have a total?

A. Yes, I have a total of all those items, two million eight hundred and forty-four thousand dollars. Now, that is at today's prices, if we wait just one year for example, it would cost an additional two hundred and twenty-five thousand dollars for these same items. We have an internal cost to that, just our awarding, our letting, advertising, receiving bids and awarding and the cost to us is twenty to thirty thousand dollars.

Q. Per contract?

A. Per contract.

Q. That is not in here, is it, Mr. Ketchum?

A. No, it is not in the list.

Q. Now, at my request, did you cause to be prepared an estimate of the cost if the State were to abandon

the expressway from Bemus Point to the Pennsylvania State Line?

A. Yes, we did.

Q. And, was this prepared under your direction and supervision?

A. Yes, it was.

MR. LIPPES: Again I'm going to object to this, we're not contesting abandoning, only contesting compliance with the law. We're not contesting at all anything other than the bridge, we're not contesting any of the highway all the way to the Pennsylvania State Line.

THE COURT: Is it my understanding that all of the roadway from the west side of Chautauqua Lake to the Pennsylvania State Line would be of absolutely no value?

MR. DALES: Well, I'm not sure, your Honor, whether it would be of no value, but it would be of little value for a long time. It would-- it's -- this ad would have you believe that point that it would be a road to nowhere, but would extend to the Pennsylvania Line

with no junction and no concrete on it. We feel we would have two stretches of this road where we owned the right of way with no highway, actual highway on them connecting nothing. We think this is out of pocket expenditure which we would be stuck with.

THE COURT: I'll allow you to answer the question, Mr. Ketchum, and make a determination later as to what I feel it's worth from an evidentiary standpoint.

THE WITNESS: All right. We have broken the bridge down by sections and it would be helpful to list the whole picture under the preliminary engineering.

BY MR. DALES:

Q. Mr. Ketchum, before you start, are there some of these costs that would be lost forever, irrespective or --

A. Oh, yes.

Q. Would you so indicate if any of these happen to be appropriate?

A. Well, these items under preliminary engineering

Section 5-A, we incurred a cost of six hundred thousand dollars to date. Some of this might be salvageable. Section 5-B, preliminary engineering, seven hundred thousand dollars. Section 5-C, preliminary engineering, seven hundred thousand dollars. Under right of way acquisition, we have spent to date, Section 5-A, two hundred seventy thousand dollars. Section 5-B, six hundred and sixty thousand dollars. Section 5-C, five hundred and eighty thousand dollars. Utility relocations, in Section 5-A, we have expended two hundred thousand dollars. Building demolition, Section 5-B, twenty thousand dollars. Section 5-C, seven thousand dollars. Completed construction, Section f-A, fourteen million seven hundred and fifty thousand dollars and Section 5-C, under completed construction, that is up to just a few days ago, two point nine million dollars. Shut-down cost on Section 5-C, site restoration, fifty thousand dollars. Materials on hand, four hundred thousand dollars. Settlement of subcontractor and supplier claims, five hundred thousand dollars. Balance due on pile equipment items, six hundred thirty thousand dollars, for a

total of twenty-two million dollars, twenty-two million nine hundred sixty-seven thousand dollars.

Q. Mr. Ketchum, does that presuppose that Section 5-D would be built?

A. Yes, there is some utility to Section 5-D, which I have not included in this estimate.

THE COURT: That runs from Bemus Point eastwards to Jamestown and past?

THE WITNESS: That's right.

BY MR. DALES:

Q. Now, do you have an estimate of the number of people employed on the job?

THE COURT: At the present time or contemplated?

BY MR. DALES:

Q. Since August of 1973 how many average number of men per day have there been on this job?

A. These are actual figures and this is Contract 5-C that is the presently active contract, the contractor has had on the site during August, an average of twenty-seven people.

THE COURT: Per day?

THE WITNESS: Per day.

THE COURT: All right.

THE WITNESS: September, thirty-eight men per day. In October, fifty-eight men per day. November, forty-six men per day, and December, forty-four men per day. We estimate that in June of next year during good weather and going according to schedule we would have on the site a hundred and sixty men per day.

MR. DALES: May I have a moment to confer with Mr. Lippes?

THE COURT: Surely.

THE WITNESS: I might add on that subject, this is the direct labor on the site only, it does not include support activities such as manufacturing of the piles in Virginia. And that if you order some blacktop from local plants or concrete from local plants it does not include any men in that category, just on the site employees.

MR. DALES: Your Honor, Mr. Lippes indicates he would be willing to stipulate to the introduction into evidence of one last exhibit on the part of the State.

THE COURT: What exhibit?

MR. DALES: That would be S-13.

THE COURT: Mark it in evidence.

(Whereupon a document was then received and marked S-13 in evidence.)

BY MR. DALES:

Q. Mr. Ketchum, I'm showing you State Exhibit S-13 in evidence, and ask you, sir, if you will look at that and tell the Court briefly what it is?

A. This Exhibit includes two letters from the State Education Department in Chautauqua County, requests for information and statements with regard to continuing work on the Chautauqua Lake Bridge as it relates to their installation, the school.

Q. The BOCES unit?

A. BOCES School area Occupational Program.

Q. Is it on the Stow side of the lake?

A. On the Stow side of the lake, adjacent to Route 17, and I think it's County Road 83.

Q. Does it indicate whether or not it was built?

A. Yes, building's completed and occupied.

Q. And, does the first letter indicate anything with respect to why they selected that location?

A. If I may read part of it, "Since the bridge will play an important part in the transportation of students from the high schools to the Center, I would appreciate current information regarding the anticipated completion date of the project. This would help us in planning future transportation schedules." That is the first letter in September, 1969. Then the second letter in November, if I may proceed, November of 1972, letter of concern, and he states that, "This location --" that is the location of the BOCES school -- "Was selected because of the State plan to build a bridge over Chautauqua Lake. Failure to build the bridge will necessitate students from the Bemus Point School District continuing to travel great distances around Chautauqua Lake to the occupational center at Ashville. We strongly urge your support for the construction of the bridge as planned."

MR. DALES: Your Honor, may I have just a moment -- Mr. Ketchum, with respect to the approach areas on 5-C, have the trees been removed in that area?

THE WITNESS: Basically no, I imagine some of them that

might be close to the buildings have been removed, but essentially the demolition -- I'm sorry, 5-C?

BY MR. DALES:

Q. 5-C?

A. 5-C now?

Q. Yes.

A. All of the trees that are going to be removed essentially are removed, I believe there's some question about where the contractor will locate an office or yard, but this is a minor part of it. Basically as far as the contractor is concerned, trees have been removed.

Q. On both sides of the lake?

A. Both sides.

Q. So, as far as trees are concerned, they will not disturb any more trees on 5-C?

A. Yes, I'm quite sure that is a good presentation.

MR. DALES: I have no further questions, your Honor.

THE COURT: Mr. Dales, you're intending to put in as an exhibit in evidence, summaries of the various figures which --

MR. DALES: I can and that probably would be helpful.

THE COURT: Why don't you look at them probably at recess or overnight, submit costs to Mr. Lippes?

MR. DALES: It's his position that it would be an assistance to him and to me, there are summaries, and if they are penciled up, they can be made available if the Court would reserve an exhibit for those I would be most happy to do that.

THE COURT: See what you can do and then submit them to Mr. Lippes for his review. Mr. Lippes, do you have any questions?

MR. LIPPES: Yes, your Honor. I would like to take a few minutes --

THE COURT: Surely, we'll take a ten minute recess.

(Whereupon a short recess was then taken.)

THE COURT: Mr. Ketchum, ready to resume?

THE WITNESS: Yes, sir.

THE COURT: May I remind you you're still under oath? Mr. Lippes?

MR. LIPPES: Yes.

CROSS EXAMINATION BY MR. LIPPES:

Donald H. Ketchum for State, Cross
by Mr. Lippes.

Q. Mr. Ketchum, let's start at the end of your testimony and work forward as long as that is freshest in my mind. First, you were talking about a number of costs on various sections of this highway and I believe the last cost was if the bridge wasn't built, you mentioned a number of costs?

A. Yes.

Q. It's your testimony if the bridge wasn't built, Section A and B, those would be of no use at all, is that correct, there would be nothing completed?

A. I included Section C also.

Q. This is assuming, I would imagine, there's no alternate route to connect with these sections, is that correct?

A. Let me put it this way, if it's possible I suppose if an alternate route is available it's possible to salvage some or all.

Q. Is it your testimony then it would be impossible or it would be impractical to furnish alternate routes that would coordinate with B and C?

A. Carrying that last statement of mine a little further, you might be able to salvage some of B, once we investigate alternates we get -- we wouldn't know

for sure whether the alternate selected could salvage any of this.

Q. But, there is a possibility?

A. There is a possibility that it could.

Q. All right. So, those costs that you mentioned on the other two sections aren't necessarily lost, is that correct?

A. There's a possibility that some part of them could be salvaged.

Q. All right. You also mentioned, I believe, one of the last questions was that all the trees that were going to be removed have already been removed on the lake, is that correct?

A. That is essentially what I said, yes.

Q. Do you know approximately how many trees have been removed at this point?

A. No, I don't.

Q. All right. Now, you mentioned a number of points, a number of things that you felt would be cost to you if the project was called up, one of those things was a project survey, a cost of eight thousand dollars, I'm not sure what you meant by a project survey, would you explain that?

A. Yes, we have an item in the contract called construction survey, this is a survey involved in laying out where the contractors could work. If there's any appreciable length of time where there's no activity, these markings disappear and they have to be re-established.

Q. In other words, you have to do another project survey?

A. Portion of it would have to be done over. Again, not necessarily all of it. We estimated there would be about that amount of work.

Q. Is that work done by your office?

A. No, in this particular contract, most of it is done by the contractor. It's checked by us so we have an investment here, a cost.

Q. Now, another point I would like to make, you said that if the contractor was held up for any appreciable length of time you might have to re-let the contract, is that right? You couldn't continue with the same contractor?

A. It's a time factor, I think that you may be able to work an adjustment, or as we indicated, we have a potential for damages if we retain the present

contractor. I indicated the escalation cost of approximately one percent a month, if you figured this out for the cost that we contracted for they aren't fair any more.

Q. Well, you mentioned an escalation cost, isn't it true that if you had initially prepared an environmental impact statement, I'll not get into that issue whether you have or not now, but whether you prepared them, isn't it true that this takes a certain amount of time?

A. Yes.

Q. Isn't there a certain amount of time that is inherent?

A. Yes, but that is allowed for when it's part of the routine.

Q. All right. Now, you mentioned also the equipment, the cost of the equipment if it laid idle, I can't quite understand why this equipment would have to lay idle?

A. There is a possibility that it would not have to be, we don't know what the contractural agreement is between the contractor and the people he rents the equipment from. We have taken this estimate, some of these figures come from the contractor himself,

his estimate of what it would cost him. Other judgments we made ourself.

Q. Now, what is the total amount of the contract you currently have with Raymond International for the sub-structure?

A. Our contract with Raymond is fourteen million seven hundred thousand dollars.

Q. All right. Initial estimates, I believe were thirteen million, this is a rough figure, is that correct?

A. I don't know.

Q. Oh, all right. That's the figure?

A. This has changed with time, of course.

Q. I understand that. I think there was a re-evaluation statement made?

A. It could be, there's been many estimates depending on the time we made them.

Q. All right. So, you have fourteen million dollar contracts with Raymond International, and it's your contention if the bridge was not built, the total amount of liability that you might be open to is two point nine million, is that correct?

A. Sounds familiar, something on that order.

Q. So, about --

A. Understand that's one section that I described.

Q. Yes, about one-seventh or a little bit more than that?

A. I haven't done my arithmetic.

Q. I haven't either. Now, you quoted us costs of right of way acquisition on 5-C, it was five hundred eighty thousand dollars. Did this include the demolition cost for the right of way or just the property acquisition?

A. That was property acquisition, I think, that figure.

Q. The demolition is an entirely different figure?

A. Yes.

Q. The demolition itself, I believe you said started in 1969 for Section 5-C? No, the spring of 1972, excuse me.

A. '72.

Q. All right. And, this was under a separate contract than the one currently in existence now with Raymond International?

A. Yes.

Q. This demolition contract was --

A. There were two of them, you know, one each side.

Q. I understand that. This demolition contract itself was for -- pursuant to separate PS&E approval?

A. Yes.

Q. When was this demolition completed?

A. In August of 1972.

Q. So, by August of 1972 you had acquired all right of way and demolished all buildings, is that correct?

A. On B, C and D, that's correct. Now, all the buildings, I'm sorry, I indicated that there were some that remained, not all of the buildings were demolished in the demolition contract.

Q. Some were done by --

A. The men under our forces, and some were -- will be done under the construction contract.

Q. All right. Now, is it my understanding that the site will be closed down for a certain number of winter months while the results of the test pilings will be completed?

A. No, that is not correct. We expect some work going on all winter long. The test pilings that were referred to are the lake piles and for the lake bridge only. There will still be the shear key activity, some pilings, driving for land bridges and earthwork related to them will still continue.

Q. I see. This work that will continue and has been

continuing, I understand that certain work has been continuing, when there was a policy decision on your part to continue the work pending the outcome of this lawsuit, is that correct?

A. That's correct. Although we don't have complete -- there is basically a mutual agreement, the contractor can go ahead with many of the activities.

Q. You have asked him to stop certain activities?

A. Yes, he has done others voluntarily.

Q. I see. Now, you mentioned that the contract itself at this point is twenty percent completed, is that right?

A. Approximately twenty percent.

Q. Is that twenty percent of dollar volume of the contract?

A. Dollar volume.

Q. Could you give us an estimate of the actual percentage of work completed?

A. No, I don't have that figure in front of me, I'm sorry.

Q. Let me ask you this, in your affidavit, you stated that the contract was three percent completed?

A. That was at the time of the affidavit. Well, there

is a time factor here, I think in between the time the affidavit may have been prepared and the information available to those preparing the affidavit for me, some of those big lump sum items on --

Q. That's dollar cost?

A. Yes.

Q. In the affidavit itself, the three percent construction complete figure that you included was that dollar figure, or was that work done figure?

A. I'm not sure, I'm sorry.

Q. You couldn't estimate at this time what the work done figure is?

A. Well, it's obviously -- you would have to deduct the lump sum items that I mentioned, the furnishings of equipment, but that is part of the contract payment item, I don't really see how you can --

Q. Well, what I'm trying to get it as to how far along the actual work done, the actual physical work, anything that was physically done to the lake or to the approach to the lake is, how far advanced that has gone? I'm wondering if you could help us out on that?

A. I can describe some of the things, but I'm sorry, I

can't give you a real figure for the items, percentage of each item complete.

Q. Let me approach it this way, we know that all the acquisition of right of way and demolition, going up is completed, is that correct?

A. Yes.

Q. There is nothing more that has to be done or anything of that sort on the land around the lake, is that correct?

A. There may be a few buildings that I mentioned, but basically the land has been cleared except for trees, which were already covered, those were taken down in the construction contract.

Q. Now, I would imagine you still have to have paving done?

A. Oh, yes. In fact, much of the paving is not included in there, that's a separate contract.

Q. And, has all the grading been done?

A. No, we're just beginning that, the shear key, the preparation.

Q. So, we still have, to go as far as where -- we still have to go on building the bridge, the grading and paving at least, is that correct?

A. Grading, there's other structures besides the main structure which we're just starting on, you heard me talk about one test pile.

Q. Over -- located at Bemus Creek and Main Street, is that correct?

A. Yes.

Q. Now, for the bridge itself then -- in the lake itself, the work that's been done in the lake itself, there's been some dredging, you mentioned?

A. Yes.

Q. Is there any more dredging that needs to be done?

A. That isn't quite completed, but virtually --

Q. There have been some test pilings done, how many test piles have gone in at this point?

A. Just one.

Q. How many more are estimated to go?

A. Four more are scheduled.

Q. How many piles, if you can just give us a ballpark figure when the structure is completed, is expected to go?

A. That's -- it will have to be a ballpark figure, just a minute.

Q. What figure did you arrive at?

A. About two hundred fifty.

Q. So, you have one piling of two hundred and fifty piles to be put in?

A. Yes.

Q. Now, are there any other structures other than pilings that will have to be put in that have not been put in yet?

A. Well, piling is a part of the structure, there's foundations, I'm sure you understand that. You have to start with this and in -- first of all, the structure on this project will have to have pilings, the foundation isn't the best.

Q. You mentioned there was a certain kind of concrete that has to be used?

A. The forms for this concrete were special.

Q. That hasn't been done yet either?

A. That's right.

Q. Now, I understand there's going to be a second contract for the superstructure?

A. Yes.

Q. How much is that contract estimated at?

A. This is on the order of thirteen and a half million dollars, superstructure and paving.

Q. Superstructure and paving?

A. And paving the approaches.

Q. Right, and that hasn't been let yet?

A. That's right.

Q. All right. So, we have a total contract to complete of the bridge and opening up of traffic of approximately what, thirty million dollars?

A. I mentioned earlier, a little less than thirty million.

Q. Of that, with your escalation clauses two point nine million has been spent?

A. No, that is the actual cost.

Q. Actual cost?

A. To date on this construction contract, two point eight million.

Q. This construction contract, right, but what I'm getting at is the percentage figure of the entire structure that's been spent at this point so that would be up to two point nine million you expended so far?

THE COURT: I believe there was a four point seven million dollar figure mentioned.

BY MR. LIPPES:

Q. Four point seven million?

A. Yes.

Q. All right. Of that cost, could you estimate how much has been expended, how much dollar figure has been expended since November 23rd of '73?

A. Of the contract amount?

Q. The entire amount, how much?

A. One point nine plus whatever work we did up to November, and that I don't have a real good figure on, but I would estimate somewhere on the order of over a million dollars, easily.

Q. So, your total is one point, or -- two point nine?

A. Two point nine total.

Q. After November 23rd?

A. Very rough estimate, understand that.

Q. So, prior to November 23rd then, we have --

A. Two point nine.

Q. One point eight million prior to November 23rd, is that right?

A. No, no.

Q. I'm a little confused.

THE COURT: I'm confused on this question too, how much money has been expended since November 23rd, was that the

question?

BY MR. LIPPES:

Q. That's right.

A. I'm sorry, since November 23rd?

THE COURT: The date of the start of this lawsuit.

THE WITNESS: Well, we'll turn that around, it would be approximately one point eight million, very rough.

BY MR. LIPPES:

Q. One point eight -- two point eight was expended prior to November, 1973?

A. Yes.

Q. Now, that two point nine figure, could you give us a rough estimate how much was expended prior to your receiving PS&E approval for the bridge structure, I'm talking about May of '73 figure?

A. This would involve only the right of way, active demolition of the buildings and so on, one point eight -- one point nine million dollars.

Q. One point nine million dollars, which was the right of way and other buildings was prior to May, '73, PS&E approval and one point eight million was expended after November, 1973 figure, is that right?

A. That's about the proper sequence, right.

Q. Okay. So, that leaves us with then let's see -- about a million dollars between May of '73 and November 23rd of '73?

A. I told you that was a very rough estimate, that isn't exactly right.

Q. I realize that we're dealing with rough figures here. All right. Now, let me ask you another question, we were talking dollar figures before in terms of actual changes to the land or actual things that have been done to the lake, what has been done between PS&E approval in May of '73 and November 23rd of '73?

A. The trees that we spoke about have been removed.

Q. They weren't removed pursuant to demolition then in the spring of '72?

A. Pursuant to demolition?

Q. They weren't?

A. It wasn't part of the demolition contract.

Q. The trees were removed during -- between --

A. This construction contract.

Q. I see.

A. This test piling activity I mentioned in the lake has

taken place.

Q. Prior to November 23rd?

A. I'm not sure, all of it hasn't been.

Q. Would you say that the test piling was done somewhere around, let's say October and November of '73?

A. No.

Q. Before October of '73?

A. No, after.

Q. After that time?

A. Yes.

Q. That test piling, that one test piling would have gone in after November 23rd?

A. Yes.

Q. All right. So, besides then, besides the trees that have been removed between May of '73 and November 23 of '73, what other types of things have been completed?

A. Site preparation, you clear the land, that is stripping activity and grubbing activity, we had some channel re-location work. The things that are low down in the contract, in the earth, are things that naturally you have to start with first.

Q. This was all under Section 5-C, grubbing and cleaning

was not under 5-D or 5-B, is that right?

A. That's right.

Q. All right. So, we have tree removal and some grubbing of the land, some clearing of the land?

A. This shear key, if you're relating it to November 23rd, I can't really place it before or after.

Q. We're talking about an estimate, really.

A. Okay. I'm sorry, what I would be prepared to talk about is the total itself, see it's difficult for me to break it down on a particular date.

Q. I understand. All right. Let's go on to something else. Did any request ever come into your office for an environmental impact statement?

A. We had -- this is part of the record, we had a number of requests for -- questions about protecting the environment.

Q. That's not what I asked you, has there been any request for an environmental impact statement?

MR. DALES: I'm going to object to the form of the question. It's unclear to me whether he means -- what he means by the question, a request for an environmental impact statement received by your office, I

don't know whether he means did somebody demand that we make one, or somebody request a copy of one?

BY MR. LIPPES:

Q. Did anyone ever request a copy of one?

A. Yes.

Q. Do you know if any of those people that requested a copy were named Plaintiffs or members of an organization of the named Plaintiffs?

A. I would have to review my material. I think the material that's in evidence would indicate that but I'm sorry, I can't really answer that question.

Q. Well, let me ask you this, in the normal course of proceedings, if you had a request for an environmental impact statement, as hypothetical, what type of reply would you give?

A. Yes, we provide a copy, this is normal if there's one required for the project and we had one, we would provide a copy.

Q. All right. And, if you don't have a copy, what would be your --

A. On this particular contract, all we were required to prepare was a re-evaluation and supplemental to that.

Q. That is what you prepared?

A. Yes.

Q. If I understand you, you did not prepare an environmental impact statement?

A. That's correct.

Q. Do you know, of your own knowledge, of any time when you would have told either pursuant to a public meeting, any of the Plaintiffs or Plaintiffs' organization that there was no environmental impact statement on this project?

A. That was the answer, that we would have given them one if we needed one for the project.

Q. In the normal course of business?

A. In the normal course of events, yes.

Q. Do you know of your own knowledge, of your ever telling anyone that either you did not have one, is that correct?

A. Yes, I thought we'd already been through that, you asked me if anyone asked about an environmental impact statement.

Q. I'm asking, do you know of your own knowledge, if any of the Plaintiffs, or named Plaintiff's organization --

A. Not right at that meeting.

Q. All right.

THE COURT: As I understand the previous question, there had been a request made of your office for an environmental impact statement, is that correct?

THE WITNESS: That's right, our response was that we were not required to prepare one for the project but we did prepare an evaluation and supplemental to it.

BY MR. LIPPES:

Q. Did you, in fact, furnish those re-evaluation and supplementals when requested to?

A. I recall one request for the re-evaluation that we did not provide copies because it was an in-house document.

Q. Well, if a specific request was made for a re-evaluation supplemental statement on this project, isn't it true you would provide this after the payment of a certain fee?

A. That's correct, and we did that.

Q. I know that, I want to clear it up, that's how I got mine. All right. Isn't it true that if anyone had

asked about an environmental impact statement or asked you about an environmental impact statement that you would have replied that you had complied with all the Federal regulations?

A. That's correct

Q. Now, in your testimony, you were talking about the cost of the entire Southern Tier Expressway, and you came up with four hundred and sixty-four point four million figure, total expended, can you give us an estimate of how much of that figure would still be used if the bridge wasn't built or if the bridge was held up for a period of time?

A. It'll take some arithmetic, if I refer to the figures, it's a matter of deducting --

Q. Just a rough --

A. -- 5-A, B and C.

Q. Okay. Well, put it this way, all the highway east of Lake Chautauqua, east of Bemus Point, you would still intend to use that even though the bridge was held up, is that correct?

A. Yes, it could be used, certainly.

Q. Okay. So, what will the issue be then if the bridge was held up, is it 5-C section, 5-B, it goes A, B

and C -- you said that some of A might be recoverable and some of B and definitely, of course, 5-C would be held up, is that correct? Definitely 5-C would be held up?

A. Right, yes.

Q. All right. Do you know of any environmental impact statements that have been prepared for other sections other than 5-C?

A. Not to my knowledge. We have done a re-evaluation, no environmental impact statements.

THE COURT: All of the Southern Tier Expressway, or vitrually all of it had been completed prior to that requirement?

THE WITNESS: Virtually all of the Southern Tier because it had been completed prior to that requirement.

BY MR. LIPPES:

Q. Isn't it true that at least for one of the sections of the Southern Tier Expressway, an environmental impact statement was submitted to the counsel on environmental quality on October 29th of '73?

A. I don't know how we could have. As I said, we haven't prepared one.

Q. Mr. Ketchum, is Monroe County in your section?

A. It is not. Region 5 covers only Erie, Niagara, Cattaraugus and Chautauqua Counties.

Q. Are you aware of some of the litigation in the Federal Courts of New York?

A. Only two or three that already happened.

Q. Are you aware of a ruling that was made by the Second Circuit that an environmental impact statement is required if PS&E approval was given after 1972?

MR. DALES: Object, your Honor, to the form of the question. It calls for a legal conclusion.

THE COURT: Sustain it at this point. He is not

qualified to answer that question, sustained.

THE WITNESS: I wasn't even aware of that.

BY MR. LIPPES:

Q. Now, Mr. Ketchum, you're familiar, I take it, with the PPMV's procedural manuals, highway administration, is that right, are you aware of any, are you aware of the hearing requirements in those procedural manuals?

A. Yes. I haven't read them recently.

Q. Are you aware of the type of hearing called an expanded hearing or design hearing?

A. Yes.

Q. And, did you ever hold an expanded or design hearing?

A. We did not. For what, sir?

Q. For the Section 5C?

A. We did not hold one. As described in those documents as you indicated, we did not hold that kind of hearing.

Q. Wasn't the hearing that was held a location hearing in '65, the hearing of November 23rd, 1965?

MR. DALES: Object to the use of the word location

hearing. It was not a location hearing at that time. It was just the public hearing required under Section 128 of the --

MR. LIPPES: Withdraw the terminology, location, it was just a word I chose.

THE COURT: All right. There was a public hearing in November of '65. There was no specific characterization of what type of hearing that was, is that correct? Mr. Lippes, is that correct?

MR. LIPPES: That's correct. Let me ask you, Mr. Ketchum, I understand that the highway runs parallel to Route 17, is that correct?

THE WITNESS: For most of it, it isn't very close and parallel to Route 17. Old Route 17, this gets confusing because that name has been transferred to the new highway.

BY MR. LIPPES:

Q. I'm just wondering if the bridge was not built and old Route 17 could be upgraded to tie in with the Southern Tier Expressway?

A. This would be one of the alternate studies and I'll leave it at that.

Q. Now, at your public hearing in 1965, were any alternatives prepared or requested of you, alternatives from your office given to any of the citizens that attended that meeting?

A. Yes, studies of alternates were referred to the hearing, in the hearing itself.

Q. Was one of the alternates rather than going over the lake to go around it?

A. On the side, yes.

Q. Was that alternative considered?

A. Oh, yes.

Q. And, that was rejected for various policy reasons, administrative reasons?

A. Various reasons.

Q. All right. Now, given those costs, I wonder if you could tell me if it would be less expensive to not build the bridge but to go around, to highway the lake in any corridor at all or any alternative?

A. That would require a whole new study. I think at the time that those alternatives were considered, it was more expensive to go south of the lake. I

would presume that conclusion would be reached again, but --

Q. You don't know --

A. What I'm trying to answer, I may have to make a decision and -- go ahead.

Q. -- what I'm trying to get at is whether or not some of those expenses to you holding up the bridge might be recovered by choosing a cheaper route, do you know if that's possible?

A. I'm not sure if I know what you mean by recovered. I stated those would be lost.

Q. In other words --

A. If ultimately we found a cheaper -- not cheaper, but a different highway, different location were built and it turned out to be less expensive than the present location, I don't know if I would call that recovery or not.

Q. That is what I mean by that.

A. It's possible.

Q. Now, are you aware of the requirements of Section 4F, Department of Transportation Law?

A. I know there is such a section of the Federal Law, yes.

Q. 4F, was it ever considered, did your office ever attempt to consider or attempt to proceed with compliance with that section?

A. It was not required.

Q. It's your position it was not required from the Federal Government, is that your position?

A. That was our feeling as well as the Federal Highway Administration or we wouldn't be where we are now.

MR. LIPPES: All right. I don't have anything further.

EXAMINATION BY THE COURT:

Q. Mr. Ketchum, was it estimated the time of completion of 5C, assuming the work is not interrupted?

A. We have a contract completion date for the present contract, June 9th, 1976.

Q. In other words, automobiles will be riding over the bridge on --

A. This is -- remember, this is the substructure.

Q. All right.

A. There will be a succeeding contract for the superstructure.

Q. Is there an estimate at this particular time as to when automobiles will be using this bridge?

A. Well, it would be at least -- if we could start the superstructure contract immediately and completion of the superstructure, it would take at least a year, I suspect, if not longer, maybe two years, one to two years to complete the superstructure.

Q. There was discussion here about a possible seven-month delay in continuance of work of this contract with 5C, is there any estimate as to the completion date of the substructure if there was a seven-month delay starting now or starting last November?

A. Yes, I indicated it would probably add one year; if we use the seven months, it would add about a year because you don't hit the seasons right.

Q. I believe you indicated, Mr. Ketchum that May 3rd of 1967, as shown by Appendix E attached to your Exhibit S2, that the FHWA approved a bridge?

A. Yes.

Q. Is that public record as far as you know, or is that -- would that correspondence be available to the public at large?

A. I don't know that at this time whether we made, we

didn't make arrangements when approval was received, but I think in any event, we surely indicated that we had their approval.

MR. DALES: Your Honor, may I say something in this regard, I think that Exhibit, Appendix E, is a letter from the Federal Highway Administration, Mr. Ketchum wouldn't be familiar with what or what not would be public records, as far as they were concerned.

THE COURT: Would there have been any publication from his department to indicate whether he received approval?

MR. DALES: That's something else. As to the letter itself, probably Mr. Scouten might be more knowledgeable about that.

THE COURT: Was there public knowledge there was approval as of May of 1967, if you know?

THE WITNESS: I do not know specifically. Ordinarily, at this time, I don't think we made an arrangement, we weren't in the -- that wasn't part of our procedure when we got approval to make a public

announcement. We do now have to do this. It wasn't, of course, looking at it from the other side, it was not secret information, that was just part of the process at the time.

BY THE COURT:

Q. Where were acquisition maps filed for those various schedules in 5C, for instance, in the county?

A. They would have to be a matter of record in the County Clerk's Office. I indicated that the right-of-way activity started in '67 and '69 and we had two demolition contracts in '72, so sometime between there would be the date of filing.

Q. Is there a roadway presently along the southern portion of Lake Chautauqua from Stow to Jamestown?

A. Yes, there is.

Q. Is it a state highway?

A. It is.

Q. Is that an alternative road that you mentioned that had been considered?

A. No, this would have been -- very, very broadly speaking, it would go parallel with that route.

Q. Do you know if there was any discussion about that

route during the public hearing of '65?

A. Yes, it was referred to.

Q. Is that part of the exhibit?

A. I think you will find --

MR. DALES: Yes, it is.

THE WITNESS: I think you'll find it in the minutes.

MR. DALES: S3, I believe.

THE COURT: Mr. O'Connor, do you have any questions?

MR. O'CONNOR: I have no questions.

MR. DALES: I have two questions on redirect.

REDIRECT EXAMINATION BY MR. DALES:

Q. Mr. Ketchum, when Mr. Lippes asked you some questions with respect to the utility of the Southern Tier Expressway without Section 5A, B and C, and I believe you answered that, of course, there would be some utility to the highway but would the scope of the Southern Tier Expressway as it was originally planned be the same without those three sections?

A. Definitely not.

Q. Why not, sir?

A. The whole concept very early of the Southern Tier

Expressway was that it was to be a developmental highway and was approved and funded by the Appalachia Regional Commission and calls for -- in accordance with the Highway Law connecting the Pennsylvania-New York State Line.

Q. And, what do you mean by the Appalachia Highway, does that have any special connotation with respect to which areas are underdeveloped?

A. Oh, yes, I didn't get into that but the name indicates this departmental highway and the whole idea behind the Appalachia funding was to help depressed areas and certain counties that fell into this category and there were project that would help to develop those counties, keep them alive and develop them.

Q. Is there any loss taxwise to the local communities by having the right-of-way owned by the State of New York, but not in use as a highway?

A. Certainly.

Q. And, how would this be reflected?

A. I have no dollar amount, but any property we acquire is exempt from local taxation and there would be no

income, no benefits deriving from the completed Southern Tier Expressway:

MR. DALES: Thank you, sir. Nothing further.

THE COURT: Do I understand there may, however, be development of the area of those towns or villages, whatever they might be, from Stow to Jamestown?

THE WITNESS: Yes, some benefits would accrue, certainly.

RECROSS EXAMINATION BY MR. LIPPES:

Q. If the highway is built, that land that would be acquired would be off the property taxes?

A. Oh, yes.

Q. Just one other question, that came to mind, and that was, you mentioned before that there was one section that nobody, no construction started and that is around the Seneca Nation?

A. That's right.

Q. If that portion was not completed or is there any estimate when that section will be completed?

A. We don't expect there to be a gap there, we're

proceedings with negotiations, when that's completed, we'll go on with construction, we don't anticipate difficulty.

Q. You haven't started a right-of-way or anything of that sort?

A. No, I said that is what we're working on now, negotiations for real estate.

Q. Okay. What I was getting at is can you give us any estimate when that section might be completed so that we might have an estimate of when the whole road would be completed?

A. Only have a very rough approximation, if we begin this year and they all started at the same time, in three or four years, it would be able to be driven on.

Q. Do you think today that it's possible that that section will be completed prior to the bridge completion?

A. Let's see, I gave you June of '76, with all the -- I mentioned that if we continued with the present bridge contract and the superstructure followed immediately, it would take two years and it would be complete in '78. I just finished saying that if

our negotiations were, we reached an equitable solution with the Indians thenwe're talking about four years to get started and, hopefully, would be finished about the same time.

MR. LIPPES: Okay. Thank you.

EXAMINATION BY THE COURT:

Q. Do you know if the State has the right to appropriate land from the Seneca Nation?

A. Yes, we do. I'm not sure about the word appropriate.

Q. So, take it from them?

A. We have a vehicle whereby we can acquire this property.

Q. As I understand it, there was a meeting or there was a public hearing in November of '65, at which time this bridge was discussed?

A. That's right.

Q. Now, the contract was just let this summer?

A. That's correct.

Q. So that's -- we've got a delay of some eight years between the original discussions concerning it and the bridge's construction?

A. Correct.

Q. Were there any unusual delays in this because it was a bridge or because it involved Lake Chautauqua?

A. The delays were not related to that problem, there were things and other factors. There was no problem with processing of this contract.

Q. What I'm trying to figure out is if this bridge were stopped and if it were then planned to run a new road along the southern portion of Chautauqua Lake, starting now, how long would it take for completion in the normal course of events?

A. Our present process, it would require something on the order of eight years.

THE COURT: Mr. Dales, anything further?

MR. DALES: Nothing further of this witness, your Honor. If I could have about five minutes' recess, I notice one witness that's showed up this afternoon.

THE COURT: Mr. Lippes, anything further of this witness?

MR. LIPPES: No, your Honor.

THE COURT: Mr. O'Connor?

MR. O'CONNOR: No, your Honor.

THE COURT: Thank you, Mr. Ketchum, you're excused.

MR. DALES: I'm informed that up in Mr. O'Connor's office, there's a possible witness up there who might be able to testify this afternoon.

THE COURT: Does everyone feel like going ahead? All right. We'll take a ten-minute recess and we'll resume.

(Whereupon, a short recess was then taken.)

THE COURT: Go ahead, Mr. Dales.

MR. DALES: We call Richard G. Chaffee.

R I C H A R D G. C H A F F E E, after being duly called and sworn, testified as follows:

THE COURT: Go ahead, Mr. Dales.

DIRECT EXAMINATION BY MR. DALES:

Q. Mr. Chaffee, what is your occupation?

A. I'm business manager for Operating Engineers

Local 17.

Q. Where is that located?

A. The office is located in West Seneca, New York.

Q. All right. Now, does this union of operating engineers that you're business manager for take in a certain geographic area?

A. Yes, it does.

Q. Tell the Court what that is?

A. It's the five and a half counties of Western New York, Niagara excluded. Erie, Chatauqua, Orleans, Wyoming and half of Genesee.

Q. And, how many members does the union have, sir?

A. Approximately twenty-four hundred and fifty.

Q. Now, has the figure twenty-four hundred and fifty remained constant, Mr. Chaffee, or has it increased?

A. It has increased over the years.

Q. And, could you tell us what it is, is there any given time period that you're familiar with that you can tell us what the increase would be?

A. Well, in the past ten or eleven years, it has increased approximately seven to eight hundred members.

Q. Is this due to some particular reason or is it

just more people?

A. Well, there are more people because of the highway work in the area, that is the main reason for this.

Q. Is this the main reason for the increase in the local?

A. Probably because highway work employs more operating engineers than it does other trades.

Q. Just for our edification, what is an operating engineer?

A. Heavy equipment, they operate the cranes and dozers and so on.

Q. What is the present employment situation of the members of your local, Mr. Chaffee?

A. Presently, we have about two-thirds of the membership out of work.

Q. Was this the usual number or is this lower or higher than usual?

A. It's quite a bit higher. It has been quite high in the last couple of years.

Q. Now, at my request, did you prepare some estimates based upon the lost payroll that could result or would result from the loss of first the 5C project

and second, 5D project?

A. Yes, I did.

Q. Did you ascertain, sir, what the normal, what the per hour rate is for an operating engineer?

A. Yes, the wages per hour are nine dollars and the fringe benefits for, well, for pension and supplemental unemployment benefits are a dollar forty, so it's a total of ten dollars and forty cents.

Q. And on a normal week, what would this amount to in terms of salary for an operating engineer?

A. Total package for wages and fringes, four hundred and sixteen dollars on a forty-hour basis.

Q. Now, how many operating engineers would there be on the Raymond Bridge job or 5C project at its peak?

A. The company has estimated that out of a hundred and sixty people employed, about fifty will be operating engineers.

Q. All right. Now, if there were fifty operating engineers on the project, what would this amount to in terms of weekly wage and fringes?

A. For operating engineers, it would be over twenty thousand dollars weekly.

Q. And in the course of estimating two years, how long do you estimate that there would be a need of operating engineers on this 5C project?

A. Well, the peak, probably thirty weeks, which is a work season per year, there would be sixty weeks that there would probably be fifty of these people working, it would taper from that figure down during the winter and build up from winter to the peak season in the spring.

Q. And, you anticipate that for two years of which this thirty weeks each year, there would be a need for the peak number of operating engineers on the 5C project?

A. Yes, sir.

Q. So, are you able to tell the Court then over a period of that two-year period, what the shutting down of the 5C project would mean in terms of lost payroll?

A. Without any employment --

MR. LIPPES: Object to the relevancy. This hearing is about the issue of Laches, the Laches issue has nothing to do with what this man is testifying about. The other point

I will make here is we're not bringing a lawsuit to start the construction of the bridge.

THE COURT: I'll overrule your objection at this time, Mr. Lippes, and I'll allow it in for what it might be worth.

MR. LIPPES: Fine.

THE WITNESS: Excluding the twenty-two weeks that I figured no employment, twenty-two weeks for the total of sixty weeks, thirty weeks each year, it would be in the neighborhood of one quarter million dollars.

BY MR. DALES:

Q. Now, do you have the same figures that relate to the 5D project?

A. Yes, I do.

MR. LIPPES: Same objection is made prior to the 5D.

THE COURT: Mr. Dales, as I understand the testimony, regardless of the 5C situation, 5D would possibly be able to be used, wouldn't it?

MR. DALES: Your Honor, I don't think it's a question

of whether it would be able to be used, the complaint is brought enough to include 5D within its ambit, I think.

MR. LIPPES: We're only challenging 5C.

THE COURT: Well, this is not a jury case. I'm going to allow it at this time for what it's worth.

MR. DALES: I'm not all that sure that Mr. Lippes may be correct with 5D, but there is a danger and I think he would agree, maybe I'm putting words in his mouth, that if the Court were to find we're out of compliance on 5C, it might very well also be that we're out of compliance on 5D and --

THE COURT: I'm going to allow it in at this particular time for what it may be worth. You may answer, Mr. Chaffee, do you understand the question?

THE WITNESS: Yes, your Honor, based on the same hourly rate and figures, the total figure per week increased, based on this type of job which is fifty hours rather than

forty, the total package, weekly, becomes five hundred and seventy-two dollars. The approximate number of operating engineers based on two-shift basis of a hundred and twenty-five on the first shift and seventy-five on the second shift, gives you a total weekly wage and fringe package of a hundred and fourteen thousand dollars. Based on a two-year contract of thirty weeks again, each of two years, a total of sixty weeks, brings you a total of slightly less than seven million dollars.

BY MR. DALES:

Q. Now, I gather that the figures that you testified to, Mr. Chaffee, assume that normal progression of the contract in both cases?

A. Yes.

Q. If there's no inordinate delay or other reason that the job wouldn't progress routinely?

A. Yes.

Q. Is this the only union on this job, Mr. Chaffee?

A. No, this would be one of five or six that would be involved on this. There is the Teamster, Carpenter, Labor, Pile Driver, Cement Mason, Ironworker --

Q. All right. Do you know what percentage the operating engineers normally would bear to the total number of union members on the job?

A. Well, on the 5C, it's approximately one-third of the work force. On 5D, it would be a larger number, more proportionately because of it being a different type job where there's earth-moving.

Q. Earth-moving?

A. Yes.

MR. O'CONNOR: Could I ask a few questions on direct?

THE COURT: You certainly may.

DIRECT EXAMINATION BY MR. O'CONNOR:

Q. Mr. Chaffee, you're personally familiar with the people that are working on this job, are you?

A. Yes, I am.

Q. I mean, you know these men, do you?

A. Personally, yes.

Q. Where are these men from that are on this 5C job that work there now?

A. Primarily from Chautauqua County, there might be one or two from Cattaraugus County.

Q. What communities are they from, generally?

A. Generally from Jamestown, a circle of maybe thirty-five miles in any direction in New York State.

Q. Are any of them from the Seneca Indian Reservation?

A. Yes, there are.

Q. Do you know how many Indians there are on there.

A. How many employed now?

Q. Yes.

A. I believe possibly of the seven men, there might be one or two, as the work force increases, they would increase in number.

MR. O'CONNOR: I have no further questions.

THE COURT: Mr. Lippes?

CROSS EXAMINATION BY MR. LIPPES:

Q. How many men are working there right now?

A. I think we have about seven operating engineers there now.

Q. All right. And, tell me if this bridge was enjoined, held up for a number of years, would your union -- and then a decision was made to continue with the bridge, would your union be the union that would be employed on this bridge in the future?

A. Oh, definitely.

MR. LIPPES: I have nothing further.

THE COURT: Anything further of this witness?

MR. DALES: No, your Honor.

THE COURT: Thank you, Mr. Chaffee, you're excused. Is there another witness?

MR. DALES: No, your Honor. He wasn't able to make it. I think we're done for the day. I have nothing further, I think we're out of witnesses.

THE COURT: That's too bad, we'll resume tomorrow at ten o'clock.

(Whereupon, an overnight recess was then taken in the proceedings.)

* * * * *

Proceedings, dated Jan. 18, 1974.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROYAL STEUBING, CHAUTAUQUA COUNTY ENVIRONMENTAL DEFENSE COUNCIL, JOSEPH CATANIA, ROVERT SEINDELL, JAMESTOWN AUDUBON SOCIETY, MARTIN OQUIST, JACK LLOYD, RICHARD MUDGE, TROUT UNLIMITED, ALAN REPPENGAGEN, CHAUTAUQUA COUNTY FEDERATION OF SPORTSMEN, CHARLES MOHNEY, CHAUTAUQUA LAKE POWERBOAT CLUB,

Plaintiffs,

-vs-

CLAUDE S. BRENEGAR, Secretary of the DEPARTMENT OF TRANSPORTATION, RAYMOND T. SCHULER, Commissioner of the NEW YORK STATE DEPARTMENT OF TRANSPORTATION,

Defendants.

Proceedings taken before EDMUND E. MAXWELL, United States Magistrate, taken in the U.S. Courthouse, Buffalo, New York, taken on January 18th, 1974, commencing at 10:10 A.M., before ANTHONY J. CUVIELLO, Notary Public.

APPEARANCES: RICHARD J. LIPPES, ESQ.,
Suite 800,
Western Building,
15 Court Street,
Buffalo, New York,
Appearing for the Plaintiffs.

LOUIS J. LEFKOWITZ, ESQ.,
Attorney General for the State
of New York,
By DOUGLAS DALES, ESQ.,
Assistant Attorney General,
Justice Building,
Albany, New York,
Appearing for Raymond T. Schuler.

JOHN T. ELFVIN, ESQ.,
United States Attorney,
By C. DONALD O'CONNOR, ESQ.,
Assistant United States Attorney,
United States Attorney,
United States Courthouse,
Buffalo, New York,
Appearing for Claude S. Brenegar.

(Continuation of Proceeding.)

THE COURT: Gentlemen, are you ready?

MR. O'CONNOR: All set.

THE COURT: Mr. O'Connor last night you gave me Defendant's Exhibits F-1, F-2 and F-3 and I'm giving them back to you.

MR. O'CONNOR: Thank you. I'll call my first witness, Mr. Moritz.

J O H N M O T I T Z, after being duly called and

sworn, testified as follows:

DIRECT EXAMINATION BY MR. O'CONNOR:

Q. Mr. Moritz, are you here today in response to a subpoena that was served by our office?

A. That's correct.

Q. All right. Now, Mr. Moritz, what is your occupation?

A. I'm an operating manager for Niagara Mohawk Electrical Unit.

Q. Where is your headquarters located?

A. In Fredonia, New York.

Q. And, Niagara Mohawk Power Corporation serves the electrical needs of Chautauqua County, is that correct?

A. Yes, sir, that's correct, plus some others, Cattaraugus and Erie, in my particular area.

Q. All right. Now, Mr. Moritz, how long have you held the position that you presently have?

A. I have been in Fredonia headquarters since May of 1968. I had a job title change in that time, I would think that it was about 1969. That is when I received my present position.

Q. All right. Now, specifically, Mr. Moritz, are you familiar with a Niagara Mohawk service center facility at Stow, New York?

A. Yes, I am.

Q. And, what is the present status of that facility?

A. Well, I would say that it's -- our facility at Stow is in construction, I would guess that it's at least fifty percent completed.

Q. All right. And, what is the purpose of this particular facility?

A. This was to serve as a work headquarters for our operating people who are now at Falconer. And, their area that they normally take care of, that would be the area of Chautauqua County extending to the Pennsylvania line and the general area around Chautauqua Lake.

Q. You say like they take care, what type of work are you talking about in connection with the words take care of?

A. They handle all phases of construction and maintenance of our electrical facilities in that particular area, all types of transmission and distribution as we know it.

Q. This is initial construction, take care of new facilities?

A. Yes, sir.

Q. Does it also involve maintenance, repair of breakdowns, this type of thing?

A. That is all handled by these people.

Q. And, this would be a facility for these people, would there also be equipment located there?

A. Yes, sir, a sizable amount of equipment, several pieces of equipment.

Q. What type of equipment?

A. They would be, they would comprise line trucks with their associated equipment. Pull setting equipment, terrain, all terrain type vehicles, crawler equipment, trenching equipment, anything that is used in construction of an electrical utility or the maintenance of it.

Q. Would this facility also store equipment or materials that are used in the work of Niagara Mohawk?

A. Yes, there is a storeroom in association with this plus considerable storage in an outside yard area.

Q. And, was there, would there be a control type facility there also, radio dispatch type situation?

A. Yes, our cars all all controlled by two-way radio system and we would have that facility at this location.

Q. All right. Would there be a facility for the men at that location?

A. Yes, there would be the usual facility that are provided for everything referring to the office force in connection with them, the planners, the locker rooms, that type of thing.

Q. All right. Now, prior to the setting up of this type of this particular facility, what if anything did Niagara Mohawk have in this area?

A. Are you referring to the area of Stow?

Q. Well, prior to the Stow installation being built, what facilities were available to do the same work that would be done at Stow?

A. We have working headquarters in Falconer plus a second as we know at Satellite in Sherman, New York.

Q. Did there come a time when it was determined this facility at Stow would be constructed?

A. Yes. We started looking for a site in this area shortly after I moved into the Lake Shore area from Olean and we knew the approximate route of the Route

17 Expressway and I was told by my boss at that time to see if I could, see if we could come up with a suitable site for work headquarters.

Q. And, approximately what time was this that you first were directed to look into the possibilities of finding a new site?

A. Well, I would say early 1969.

Q. All right. And, in connection with this, did you have studies made, plans prepared to determine where a good site would be?

A. Yes, we made informal studies, we had our local people over there, our supervision over there and we got their opinions on this. We looked at what we thought would be our growth area to see what locations would be the best to base our headquarters for that particular area.

Q. All right. Now, showing you a document which has been designated Exhibit F-4, I ask you if you can identify what this is?

A. Yes, it's a --

THE COURT: Excuse me, Mr. O'Connor, where do you want to put all those other exhibits, so we can get them out of the way?

MR. O'CONNOR: They're all Mr. Dales' exhibits, maybe he could keep them for a moment.

THE WITNESS: It's a map of Chautauqua County and it shows our major transmission facilities and it also shows this Stow location.

BY MR. O'CONNOR:

Q. Before you get into too much of a description of it, can you tell me when that was prepared and what it was prepared for? Approximately, if you don't know the exact time?

A. Well, I would say that was prepared around 1970 and it was a study, a study we made to show us the various driving distances and we could translate that to the time to reach any portion of our operating area.

Q. Okay. I would offer Exhibit F-4 at this time into evidence at which time the witness could testify concerning it.

THE COURT: Mr. Lippes, have you had an opportunity to look at it?

MR. LIPPES: No, I haven't as of yet. I'm going to object only as to relevancy.

THE COURT: Overruled at this particular time. Mark

it in evidence.

(Whereupon, Exhibit F-4 was then marked into evidence.)

BY MR. O'CONNOR:

Q. Now, Mr. Moritz, would you describe, can you tell us whether this diagram shows where the facility in Falconer and Sherman are located?

A. Well, Falconer, the village itself is identified and Sherman is identified and our existing facilities are within the corporate limits of those.

Q. Does this diagram also show a red line that runs from east to west across the entire area of Chautauqua County?

A. Yes sir, it does.

Q. What does that designate there?

A. That's a designation we used for the route of the Southern Tier Expressway.

Q. And, this was put on the map by who, do you know?

A. I believe this map was prepared by our planning department, and I can't tell you exactly who prepared it.

Q. But, it was somebody in your planning department, and it was prepared at that time showing the

location of the proposed Southern Tier Expressway. is that right?

A. That's right. And, it was prepared under the direction of our planning supervisor.

Q. And, it shows the route of the Southern Tier Expressway running across Lake Chautauqua at Bemus Point and Stow, is that correct?

A. In general terms, yes.

Q. Now, does this diagram also show various routes radiating from Stow with numbers designating numbers of miles?

A. Yes, sir, it does.

Q. Could you describe what those are?

A. Well, this was the result of our study, to determine what our distance in driving time would be from the proposed Stow site.

Q. And, could you describe what it shows specifically?

A. Well, it shows driving times to the -- or the distances rather, from that site to the extreme northwest of the County as being twenty-four miles, to the southwest as being twenty-six miles, to our eastern extreme facility as being twenty-six and thirty-two miles and distances to our Fredonia work

headquarters as being twenty-seven and twenty-nine miles.

Q. None of the distances that have been designated on there is over thirty miles from Stow?

A. No sir, none of them are over thirty, twenty-nine is the longest distance.

Q. This would pre-suppose the use of the bridge over Lake Chautauqua?

A. That's correct.

Q. Would these designations be correct as they proceed towards the east if there were no bridge at Stow to Bemus Point?

A. No, none of these figures, these distances on it east of the lake would be valid then.

Q. All right. Now, specifically, do you recall at what time, what point this Stow facility had reached the point where you were going to have a contract let?

A. We had a pre-bid meeting I believe with contractors about mid year of 1973, sometime, I'm only estimating this as being July or August, and a contract was let on this, I would say in early fall, in late September or early October, the contract was actually

let.

THE COURT: Of what year?

THE WITNESS: 1973.

BY MR. O'CONNOR:

Q. All right. And, has the construction been started on this project?

A. Yes, construction is well along on the work headquarters at Stow.

Q. When did the construction actually start?

A. My best guess on that would be --

Q. Don't use your best guess, you mean the best of your recollection?

A. Yes, best of my recollection the site preparations and foundations were started in late October.

Q. And, what is the stage of construction right now?

A. Well, all foundation work is completed. The building itself is basically complete. That's all of the masonry work, the floor work, a good share of the electrical work, the plumbing work, sanitary sewer facilities, grading, exterior work, the roof and structure are complete. I would say that about all that is left to do on that building to complete it is install the insulation in the roof and do the

interior painting work plus the blacktop grading on exterior.

Q. When is your projected time for beginning use of this facility?

A. Well, our projected time originally was early 1974, we expected to be in there by the end of January, but our contractor has been held up by problems with some of his materials, his insulation supplier is on strike right now.

Q. What is your present expectation?

A. Our present expectation is no later than May, 1974.

Q. Now, do you know how much the cost of this facility is?

A. It's in excess of four hundred thousand dollars.

Q. All right. Now, since the commencement of the construction of this particular unit, has anything been done with regard to the Falconer facility?

A. Well yes, it has. The electrical company in Jamestown which is a municipal company requires additional room, expansion of that facility and they have contacted us and I understand that an agreement has been made and they're purchasing a portion of our property at Falconer to expand their facilities. I believe we

made a commitment to be out of there, in one portion of it, in May.

Q. Has there been a contract to actually sell this facility to the municipal authorities?

A. Yes sir, there is a contract.

Q. When was that contract entered into, the best of your knowledge?

A. To the best of my knowledge I would say December sometime.

THE COURT: 1973?

THE WITNESS: 1973.

BY MR. O'CONNOR:

Q. All right. Now, were you familiar with the construction activity on the bridge and on both sides of the lake in connection with your own official duties?

A. Yes sir, we were directly involved. You're referring to the construction on the expressway?

Q. That's right.

A. We were involved in that, in removing and relocating our facilities.

Q. Now, do you recall when construction was started on

your Stow facility, what the state of construction activity on the Southern Tier Expressway on the bridge specifically?

A. Well, when we started on it on our Stow facility there was bridge equipment out on the lake performing some operation in conjunction with the bridge. There was property cleared on both sides, what I assume are the approaches, we had removed our facilities and during this construction of our building I have noticed, I did go down and saw some large, what I assumed to be large cranes for driving piles and this type of thing.

Q. So, you could tell, you could see the construction activity going on the bridge, is that right?

A. That's right.

Q. If you had known in say June of 1973 that this lawsuit would be pending and there was a potential for an injunction that there might be a delay of perhaps a year or perhaps more in construction of the bridge, or the possibility that there may never be a bridge built, would that have changed your judgment with regard to the Stow facility?

A. Well, I would have certainly passed this information

along to my superior, knowing the amount of money that this was going to cost.

Q. What was that amount of money for the Stow facility, you said this was over four hundred thousand dollars, is that right?

A. In excess of four hundred thousand dollars.

Q. In what ways has it effected your own personal judgment in this matter, what recommendations would you have made if you knew this in June?

A. We would have passed it along to our engineering people and to my superiors and this may have affected their construction schedule inasmuch as we have several projects going on in our Western District. I certainly would have had, if I had known there was any question of this bridge being built, I certainly would have had misgivings myself as to whether we should relocate the Stow site.

Q. Why?

A. Well, as I said, we're mid point of Chautauqua Lake which provides along a natural barrier and without a bridge at this location we cannot operate efficiently from this point where we're now building in this area.

Q. Certainly could use the ferry, couldn't you?

A. Well, no sir, the ferry is not suitable for our type of equipment. First of all it's -- in the past few years the ferry seemed to attract a lot of tourists and it's very seldom during the summer months or it's rare that you can get on without a substantial weight. We do have several pieces of equipment because of length that we couldn't transport them across the ferry and I'm referring to large pole setting piece of equipment, plus its associated trailer. We don't attempt to use the ferry for that type of thing. Also the hours of the ferry are restricted, that doesn't operate twenty-four hours a day, it isn't open twelve months a year. So basically we do not rely on it for our line construction equipment.

Q. If you were operating out of the Stow facility and there were no bridge, what effect would that have on Niagara Mohawk's operation to the east?

A. Well, from our own point of view it would be an inefficient operation. Our cost would increase but I think the most important thing is we could not render the type of service to our customers that

we should. Our restoration time on line outages would be prolonged.

MR. O'CONNOR: I have nothing further.

THE COURT: Mr. Lippes?

EXAMINATION BY MR. LIPPES:

Q. Mr. Moritz, now, you started looking for a new facility because the area was determined as growing, is that correct?

A. Yes -- no, that is not entirely the full story.

Q. Was that one of your considerations?

A. It was one of our considerations.

Q. And, you had decided then to look for a place to build this facility, is that right?

A. That's correct.

Q. And, you normally, when you build a facility in an area, you normally attempt to build near a location of major transportation routes, isn't that correct?

A. Or routes that we knew were going to be built.

Q. All right. And, regardless of whether the bridge is built, portions of the Southern Tier Expressway are still in existence, are still being used, is that

correct?

A. Portions of it are being used to the east of Chautauqua Lake, to my knowledge, there's none of it being used to the west of it.

Q. Right. Now, Mr. Moritz, you were asked the question if you knew that the bridge was going to be held up through litigation, would you make any recommendations let me ask you this, if you knew this bridge would be held up due to non compliance of Federal laws, would you have made any recommendations? Non compliance of Federal laws?

A. I don't think I would have been able to determine anything as to whether it was in compliance with Federal laws.

Q. That was my question, if it was held up due to that reason if you knew that to your knowledge, would you have made any recommendations?

A I would have made a recommendation had I known of anything that would hold that bridge up.

Q All right. Right. Fine. You don't have the responsibility of making the decision for the place, where the place of the facility would be, you would be purely recommendatory to your superiors, is that

correct?

A. That's correct.

Q. Now, prior to the building of the bridge, and building of the Southern Tier Expressway, isn't it true that you were also still servicing people in your area?

A. Well yes, we've always taken care of our customers in that area.

Q. Isn't it true that regardless of whether the Southern Tier Expressway and bridge over Chautauqua Lake is built you would still have to service the same customers?

A. We would have to service the same customers. Not necessarily from that same work headquarters.

Q. I understand that. Isn't it true that prior to your work headquarters at Stow you testified you had two kinds of substations, is that right?

A. Well, I believe I testified we had a working headquarters as we know it in Falconer, in the corporate limits and we have another one we call a Satellite only one crew in the Sherman area.

Q. Let me ask you this, now, assuming that the bridge was not built and assume that the facility at Stow was built, would you say that the facility at Stow

would be more efficient than no facility at all, than what you had prior to that time?

A. Do I understand your question -- could I answer your question the way I understand it?

Q. Right.

A. We could not operate from Stow in my opinion as efficiently as we could from our existing facilities.

Q. All right. But, the existing facilities are still in operation, is that correct?

A. They're in operation but we do not have the employment, only one of them that will restrict us.

MR. LIPPES: All right. Fine. No further questions.

EXAMINATION BY THE COURT:

Q. May I see the exhibit, please? Where is the Sherman section located, Mr. Moritz?

A. Right there, right at the intersection of those three lines.

Q. Do you know what the present furthest distance is from either your station to the most northerly part of Chautauqua County at this particular time?

A. Well, I do know that from Falconer, from our Falconer

headquarters to get into what we know as the Ripley area, adjacent to the lake, we're talking of driving time well in excess of an hour with our equipment.

Q. How about from Sherman, from Sherman to Falconer?

A. It would be approximately half that. I might point out one thing, it's a small headquarters and very often because of vacations or sickness the people are not available, crews are not available and we have to send them from another headquarters at a greater distance.

Q. How long is Chautauqua Lake, by the way, do you know?

A. Well, I've always thought of it in terms of being eighteen to twenty miles.

Q. Where is the Stow, Bemus Point area in relation to the east end of the lake, if you know?

A. Well, we always think of it, I think of it as being approximately the mid point.

Q. So, approximately ten miles from Stow to Jamestown and approximately ten miles from Stow to Mayville?

A. No, sir, I was thinking airline miles, driving miles more than that to our Falconer headquarters. I would guess it would be closer to fifteen miles.

THE COURT: Do you have anything further, Mr. Dales?

MR. DALES: No, I don't, your Honor.

THE COURT: Mr. O'Connor?

MR. O'CONNOR: No,your Honor.

THE COURT: Mr. Lippes?

MR. LIPPES: Nothing, your Honor.

THE COURT: Thank you, Mr. Moritz.

MR. DALES: Your Honor, at this time the State would like to call John Luensman.

J O H N R. L U E N S M A N, after being duly called and sworn, testified as follows:

DIRECT EXAMINATION BY MR. DALES:

Q. Mr. Luensman, would you please identify yourself?

A. I'm John R. Luensman, director of the Chautauqua County Department of Plans.

Q. And, for how long have you been so employed, sir?

A. Since July of 1960.

Q. And, can you tell the Court a little bit about your duties as planning director of Chautauqua County?

A. I am responsible for the development of a comprehensive planning concept for Chautauqua County. This

entails the development of background data concerning all aspects of the County. And, in examination of all alternative solutions to any type of question that might be presented to the County Planning Board, or might be asked of the County Planning Board by the County Legislature. I have also been assigned specific responsibilities by the planning board. One that I have been deeply involved in since 1966 was acting as secretary to the Urban Area Planning Board of Southern Chautauqua County.

Q Would you tell the Court, sir, what is the Urban Area Planning Board of Southern Chautauqua County?

A. The Urban Area Planning Board of Southern Chautauqua County is the largest intermunicipal planning body in operation within the State of New York. Fourteen local governments including the City of Jamestown, the Villages of Falconer, Celoron, Lakewood, Mayville, and Bemus Point, and the Towns of Poland, Carroll, Kiantone, Busti, North Harmony, Chautauqua, Ellery, and Ellicott. I believe that's a total of fourteen municipalities. They joined together under the regulations of the town, the city, the village and the general municipalities law in the development of

an intermunicipal planning program.

Q. When did this group form, Mr. Luensman?

A. It was adopted in early 1966 by the Chautauqua County Planning Board to attempt to form an intermunicipal commission or planning device for the villages and towns in the Chautauqua Lake area patterned after the effort we had successfully completed in the Dunkirk-Fredonia community where we, the Urban Area Planning Board was put in operation and where the economic community instead of municipal boundaries became an extension of the planning region. The only impetus for the formation of the Urban Area Planning Board of Southern Chautauqua County was at that time a Federal grant that required consideration of areawide planning programs as Federal grants were being considered for water and sewer facilities. I suppose it would be easier to just say grouped into a whole package of Federal aid programs that were available at that time. So, this was a second driving force that caused these communities to join together in a joint planning effort to serve the total community.

Q. Mr. Luensman, when you say planning activity, could

you tell the Court what kind of planning we're talking about, is it family planning, is it just -- what kind of planning are we involved in here?

A. The general municipal law, town, village, city law from the State of New York stipulates the creation of a -- laws for authorizing local governments to determine by planning organizations to support government decision making. And, you name a municipal problem and this question could at sometime be referred to the Municipal Planning Board.

Q. What factors are taken into account that your Urban Area Planning Board would do for them?

A. All public and economic considerations that we could identify. All geographic, regional intermunicipal State and Federal programs and policies and activities. It covers the whole day to day way of life for local governments so there is, you name an item or a question and possibly one of the local planning boards or Intermunicipal Planning Boards or County Planning Boards had dealt in the question or has been associated,either their staff or their constituents to collect data on it.

Does it take into account it's -- is it part of the

planning process to take into account the resources that a particular area might have?

A. That is what I meant when speaking of geography, including the natural resources, yes.

Q. How about man made resources?

A. All man made resources, all man made facilities.

Q. Would this include I suppose highway systems?

A. Highway systems, water systems, power distribution systems, telephone systems.

Q Actual or proposed?

A Actual and proposed.

Q. Have there been any results from this Urban Area Planning Board of Southern Chautauqua County?

A. Yes, there are a series of reports released in draft form in 1970 and final documentation in 1970 and '71, final result was a proposed planning program for thirteen of the fourteen participating municipalities. The City of Jamestown being excluded because they had an individual plan as part of the program which they had completed, it was their own individual plan. But the City of Jamestown, did directly participate in the creation and formation of the regional places which we cover which is all

fourteen municipalities.

Q. As a result we have a planning program, is that the right term?

A. That is a good one.

Q. For thirteen of the fourteen participants?

A. Individual planning programs, yes, and then all fourteen joined together in the creation --

Q. Of a single plan?

A. Of a single plan, additional planning concept.

MR. DALES: Your Honor, may I take a moment to have some exhibits marked for identification?

(Whereupon, eight documents were then received and marked S-14A, S-14B, S-15A, S-15B, S-16A, S-16B, S-17 and S-18 respectfully for identification.)

BY MR. DALES:

Q. Mr. Luensman, may I show you Defendant's Exhibits S-14A and S-14B and ask you, sir, if you can identify those?

A. Yes sir, these are the regional plan proposal statements made for the Urban Area Planning Board of Southern Chautauqua County. S-14A is part one background statement of the elements that were

considered and 14-B is the final planning report which was issued as part of the Urban Area Planning Board program. I might add this particular program was finished in part by the local municipalities and part by the State of New York and in part by the Federal government through the Urban Area Planning assistance program of the Department of Housing and Urban Development.

Q. And, planning for this report was done when, sir?

A. The negotiations with the consultants to do the work was entered into in 1967 and the consultants officially came and were working in 1968 and 1969 and part of '70.

Q And, from '68 until 1970, the input was placed into the project I gather?

A. Yes, sir.

Q Could you tell us a little bit about who had input into the project?

A. The planning consultants basically gathered together in the first stage, the background information as to the assets and liabilities and problem areas to be found within the planning municipalities. This was done on an individual municipal basis and then

conglomerated as part of the regional examination of problems. It was carried on through the effort of the Regional Planning Board or I would like to use the term regional instead of Urban Area Planning Board of Southern Chautauqua County, if I may, and the individual Municipal Planning Board. The Regional Planning Board would meet on the third Thursday of every month. The individual Municipal Planning Boards would meet at least one night a month to hear reports from the consultants, make criticisms of the consultants' work and then bring any problems that they had to the regional level where they related to regional problems. One of the reports notes that the consultants attended approximately a hundred and fifty meetings during the development of this planning program with the Regional Planning Board and the individual Municipal Planning Boards.

Q. Did the Southern Tier Expressway play any part in the determination of this Regional Planning Board?

A. The Southern Tier Expressway is noted in the planning reports as the critical element in the planning for the regional planning and for individual municipalities.

Q. Does the Lake Chautauqua Bridge in particular play any special significance in the formation of this plan?

A. Yes, it does, it is recorded as a part of the Regional Planning Program as it was developed and is part of the planning statement in the final documents. In the individual planning reports the Southern Tier Expressway and effect on local traffic patterns is also mentioned. The Regional Planning Board also in 1968 and '69 volunteerd to be the local citizens advisory body to the Jamestown transportation study. This was a required program to the best of my knowledge, required of the association in the development of the State wide Transportation Planning Program. There is a good report in the minutes of the Regional Planning Board as to the local debates concerning alternative proposals for the Jamestown transportation study. Better than a year of debates and finally on motions at the Regional Planning Board level the approval of a Jamestown area transportation plan that included the alignment of the Southern Tier Expressway and the concept of a bridge crossing Chautauqua Lake.

Q. Now, Mr. Luensman, does the final regional report or plan for the Chautauqua region pre-suppose the existence actually of the Lake Chautauqua Bridge?

A. It includes, it very definitely, the completion of the Southern Tier Expressway and the alignment across Chautauqua Lake.

Q. Now, could you tell us something about the distribution of this document?

A. This document -- I do not remember the contracted number of copies involved, but each community received copies of its own individual planning reports and the regional planning reports. It was the intent at the regional level that copies of these documents would not only be able to be accessible to each of the participant municipalities, but also each of the local localities within the region as well as our community college library, the James Prendergast Library that serves the region.

Q. Was it a public document that was free to anyone that sought it?

A. This document is accessible to anyone that would look for it. It is also on file with the County Department of Planning.

MR. DALES: I offer Exhibits 14-A and 14-B in evidence, your Honor?

MR. LIPPES: I object as to the relevancy, your Honor. They're trying to show that all of this planning was done on the idea that everyone felt there was going to be a bridge for a number of years and then that Laches sets in or that this planning overall purpose of this plan and to show the economic and other aspects of the bridge as opposed to an alternative.

MR. DALES: I object your Honor, it's going to a question of what everybody thought was going to happen in the area. In other words, the planning of that entire area has been centered around the existence of the Southern Tier Expressway as we projected today.

THE COURT: Is it your argument that this doesn't constitute Laches?

MR. DALES: That is one aspect of this, but it's my thought that there is notice.

THE COURT: There's a question of notice to parties

that there was going to be a bridge.

MR. DALES: Yes, also the people planning, the local planning in the area who are by the way I assume the representatives of the majority of the people in the area, the elected representatives planning around what the majority of the people have indicated they want. They are expressing what the majority of the people want and bear in mind that you have fourteen different governmental units working together, and that is a fantastic accomplishment if for no other reason --

THE COURT: Well, I'm going to allow it if on the question of knowledge, notice of whatever it may, referring your objection to it and as to the other aspect of it, I'm going to take it in for what it's worth, at this particular time, Mr. Lippes. I think this witness indicated that these plans started in 1967 and presupposed a bridge so whether or not they got into the question of whether or not

a bridge would be good for the whole community or not, is something I don't know.

MR. DALES: I don't think that is relevant, your Honor, because the bridge as our exhibits have already shown was based upon a concept in August of 1965 long before the planning board began its operations. They're really just following along with what had already been proposed to them at the public hearing in November of 1965 that there would be a bridge somewhere in the area.

THE COURT: All right. Mark them in evidence.

(Whereupon, S-14A and S-14B for identification were then received and marked S-14A and S-14B in evidence.)

BY MR. DALES:

Q. Mr. Luensman, I show you Exhibits S-15A and B and S-16A and B, sir, and I ask you if you would identify each of those documents individually?

A. S-16A is the background statement for the Town of Ellery presented under the --

Q. Is that 15-A?

A. I'm sorry, 15-A is the background study statement prepared for the Town of Ellery as part of the individual Municipal Planning Program which was a part of the Regional Planning Program. Exhibit S-15B is the planning statement for the Town of Ellery.

Q Do Exhibits 15-A and 15-B derive their existence from Exhibits 14-A and 14-B, all growing out of it --

A. I would rather say it was in the other direction, that 14 -- S-14A and B derive their existence from the town and the village plans.

Q. Let me ask this, which, Mr. Luensman, do you say, 15A and 15B represent the same study though in more specific form as 14A and B?

A. Yes, sir.

Q. And, is it the same true of 16A and B?

A. Yes, this is an example of the type of village planning that was created and this is a background statement in S-16A for the Village of Falconer and S-16B is a plan statement for the Village of Falconer.

Q. Could you tell us very briefly is there any difference

in the planning concepts between the Town of Ellery and the Town of Falconer?

A The most important factor here being density as which population was going to settle and existing utility services and public facilities to service the polulation density.

Q When you say public facilities available, are you referring to, in part highway facilities?

A. We're discussing highway facilities, water and sewer facilities, police services, garbage collection services, anything that the public sector of government would be involved in or the individual citizen might find himself involved in when he may seek a community service rather than individual service.

Q Now, would Exhibit 15 and 16 have been centered around or predicated upon the eventual building of the Southern Tier Expressway and the bridge route in particular?

A. They included, they include the concept of the Southern Tier Expressway as presently proposed and the bridge across Chautauqua Lake.

Q Again, with respect to distribution of those four

documents, were they freely available?

A. I don't know if they're available still at this date, but in the period of time when they were distributed, copies of these documents were available at municipal buildings of each of the government units. I do notice today when you walk into the Town Hall of the Town of Chautauqua, one of the first things you would see would be copies of the Town of Chautauqua plan part one and part two.

Q Was this one of the requirements that they be made available?

A There was no requirement, but when you're dealing with public money and creation of documents with public money, they must be freely accessible.

MR. DALES: I offer in evidence 15-A, B and 16-A and B, your Honor.

MR. LIPPES: Same objection.

THE COURT: Where is the Town of Ellery?

THE WITNESS: The Town of Ellery, sir, is the township in which the eastern terminus of the proposed bridge is.

THE COURT: Bemus Point is in the town of --

THE WITNESS: Bemus Point is a Village in the Town of

Ellery.

THE COURT: Overrulled. put them in evidence on the same basis.

(Whereupon, Exhibits S-15A, S-15B, S-16A, S-16B for identification were then received and marked S-15A and B and S-16A and B respectfully in evidence.)

BY MR. DALES:

Q. Mr. Leunsman, I show you Exhibit S-17 for identification, and ask you, sir, if you can identify that?

A. S-17 is a report titled Chautauqua Lake Study, it was the second phase of the Intermunicipal Planning Program instituted under the Urban Area Planning Board of Southern Chautauqua County. It is a specific look at Chautauqua Lake as a regional resource and documents some of the problems of the lake. It makes proposals as to development patterns around the lake and it suggests additional studies needed in order to protect the lake.

Q. When was the study begun?

A. This was begun in mid phase of the first contracts with the firm of Kennedy and Shepard that resulted in Exhibits 14 through 16.

Q. Is it still a product of the Urban Area Planning Board of Southern Chautauqua County?

A. It is a product of the board, yes.

Q. Of the fourteen?

A. Of the fourteen municipalities. They all worked together for its preparation.

Q. When was it published?

A. It was published in July of 1970.

THE COURT: 1968 would be the time for the beginning of the study?

THE WITNESS: I would have to go to the official records to show you the exact date that that particular study started.

THE COURT: It's my understanding that you said negotiations started I believe in 1967 and work started in 1968?

THE WITNESS: Negotiations were carried through 1967 and started, yes, sir.

THE COURT: When, approximately would this Exhibit 17 have been commenced, the study itself?

THE WITNESS: In the late part of '68, early '69.

THE COURT: All right.

BY MR. DALES:

Q. Were there any public meetings ever held with the preparation of this report?

A. All of the reports have the usual public hearing in early 1970 at Southwestern Central School. Invitations were sent by the Urban Area Planning Board of Southern Chautauqua County to all elected officials within the planning area. This meeting was published prior to it happening and we had the news media coverage at the meeting at which time the drafted documents were displayed around the walls of the meeting room. I might say that the lake plan itself was made up of a montage of maps and the study map shown was probably eight feet by twenty some odd feet. It was based on the tax map that had been created for the county so that it would allow a person to identify the general location of its individual property.

Q. Was the bridge, subject of the bridge across the lake brought up at that meeting?

A. It was there and shown on the maps and was part of the highway transportation discussion and presentation.

Q. Was there any other public hearings or presentations

in connection with the preparation of this report?

A. There were numerous opportunities for people to participate in the planning program either at the regional planning level or at the individual planning board level. I'm sorry that I do not have the complete newspaper clipping file and the number of times that this whole planning program was noted in the newspaper either because a reporter was at the meeting to report the meeting or the meeting was of such size and scope that there was considerable press coverage on the whole planning program.

Q. You will on future projects, won't you?

A. We really didn't anticipate a Court case.

Q. Getting back to this, was this Southern Tier Expressway and bridge in particular a factor in the final result of product that emanated from the original lake study?

A. If you read the final statement the crucial portion of the Southern Tier Expressway as illustrated in the maps and as mentioned a number of times in the report in particularl in the circulation section in order to advise the citizens of the economic activity of the region.

Q. Now, did this particular document, sir, have the same public distribution and availability as the previous report you testified to?

A Yes, sir.

MR. DALES: I offer Exhibit S-17 in evidence, your Honor.

MR. LIPPES: Same objection.

THE COURT: Same ruling, put it in evidence.

(Whereupon, Exhibit S-17 for identification was then received and marked S-17 in evidence.)

BY MR. DALES:

Q Mr. Luensman, I show you Exhibit S-18 for identification, and ask you if you can identify that?

A. Yes, I can. It is a Jamestown transportation study. This document was prepared by the State of New York Department of Transportation. It is the document which I referred to earlier and to which I alluded that there was a substantial amount of debate at the local Planning Board level and that the Regional Planning Board level in the minutes of the Regional Planning Board. I can show almost a year of debate on the development of the Jamestown transportation

study development.

Q. Is there any input from the Regional Planning Board comprised of those fourteen governmental entities?

A. Yes, the Urban Area Planning Board of Southern Chautauqua County, the representatives on the Urban Area Planning Board were the citizen advisory committee. I have not mentioned prior to this but I think it is important that I do at this time to mention the people. You had your Urban Planning Board of Southern Chautauqua County, each mu-- nicipalityhad a minimum number of two representatives on the Regional Planning Board. Those two persons with the exception of the City of Jamestown, they had four representatives, included the chief elected officers, either mayor, town supervior, or the chairman of the Individual Planning Board of that municipality. In the case of the City of Jamestown a member of the Common Council and the director of Public Works also served representating the City of Jamestown to fill out their four representatives. This study does include an alignment of the Southern Tier Expressway and contains the principal of the

completion of the Southern Tier Expressway with the bridge across Chautauqua Lake. That was completed and the document published in October of 1970.

The State published the document in October of 1970.

Q. You mentioned I believe it does include the Southern Tier Expressway generally and the bridge concept in particular as part of the planning program?

A. Yes, sir.

Q. And, is this a public document, sir?

A To the best of my knowledge it is. I had nothing to do with its distribution. I believe at least one copy has been distributed to everyone of the participating municipalities. My copy is available in my planning library for anyone that is interested in looking at it.

MR. DALES: I offer that in evidence, your Honor.

MR. LIPPES: Same objection, as to this one there's apparently been no testimony on the distribution except one copy to each of the municipalities and one copy that is in his library.

THE COURT: I'm going to allow it for what it's worth, Mr. Lippes. Mark it in evidence.

(Whereupon, Exhibit S-18 for identification was then received and marked S-18 in evidence.)

BY MR. DALES:

Q. Mr. Luensman, were the Urban Area Planning Board's membership meeting open or closed?

A. They were open.in each of the municipalities.

Q. Are you able to tell the Court, sir, in the planning process of these documents that are now in evidence, how many people were directly involved in the preparation of them?

A. The citizen input or local input would have to include no less than the individual Municipal Planning Board's and in number of instances the debate of particular segments of questions on the program at the Town Planning Board level and Village Planning Board level and at the City Planning Board and Common Council level. So, I would have to say a minimum, direct people participation it would be a minimum of five persons in each municipality on the local government level and at least five persons in the Local Planning Board for a minimum total of a hundred and forty persons

distributed throughout the planning region.

Q. How about indirect?

A. With the amount of publicity we received --

MR. LIPPES: Object to that reference to indirect.

THE COURT: I'm going to sustain that. He claims there was publicity on this and I can draw any conclusion if I feel any should be warranted.

BY MR. DALES:

Q. All right. In your capacity as the community planner, Mr. Luensman, do you know whether the County Legislature made any commitment for or against the bridge project?

MR. LIPPES: Object to that on the grounds of relevance on this issue of Laches.

MR. DALES: I think it's very relevant, your Honor, if specifically if the County Board has come out with a recommendation for or against a project and it has received public attention, I think it's very relevant.

THE COURT: I'll allow him at this time, Mr. Lippes. One of the questions in my mind is if

they did, when it occurred, you may answer, Mr. Luensman?

THE WITNESS: In November of 1972 the Chautauqua County Planning Board wrote a background statement to the County Legislature as they were debating a resolution concerning encouragement to the State to complete the construction of the Southern Tier Expressway as presently alligned. In this letter which I believe was dated November 8th, this is 1972, a background summary of the general attitudes of the community and the County Legislature, a question of a bridge was outlined and it started back in 1956 with some references and built up to the date of the letter and it includes a summary of the fact the county is considering bridging Chautauqua Lake in the 1950's. And, the result alluded to the reports of a study that was completed at that time. It also summarized some of the other transportation needs in the area, some of the legislative action

taken place over-time on behalf of the County Legislature leading up to this resolution that was then being debated in the November meeting of the Chautauqua County Legislature.

BY MR. DALES:

Q. Mr. Luensman, I'm handing you a document which is already in evidence, I ask you if you will look at this and tell me is that the resolution that you're referring to?

A. Chautauqua County Board of Legislature's were at resolution 268-72, yes, sir.

MR. DALES: Thank you.

THE COURT: That is all already in evidence?

MR. DALES: Your Honor, that is Exhibit K attached to Exhibit S-2. I have no further questions of this witness.

THE COURT: Mr. Lippes, it might be feasible to take a few minutes before you begin your cross-examination to give you an opportunity if you wish to look at these various exhibits. How much time would you need?

MR. LIPPES: I think five minutes will be fine.

THE COURT: I'm going to give you ten.

(Whereupon, a short recess was then taken.)

THE COURT: Mr. Lippes, are you ready to proceed?

MR. LIPPES: Yes, sir.

THE COURT: Mr. Luensman, you're still under oath.

THE WITNESS: Yes, sir.

CROSS-EXAMINATION BY MR. LIPPES:

Q. Mr. Luensman, in all of your planning processes and in your putting together of regional comprehensive programs, you again take into account all of the transportation needs, is that correct?

A. Based on available information, yes sir.

Q. Right. And, you would include in your planning process any planning or any public highways, bridges, rapid transportation or waterway needs, the kind of needs, is that correct?

A. Including some that existing agencies may have no knowledge of.

Q. All right. We may pre-suppose needs?

A. Yes, sir.

Q. Besides that, Mr. Luensman, isn't it true that you plan ahead a number of years in your regional planning?

A. This is a basic import means of a planning process.

Q. That's right, about how many years would you say you plan ahead?

A. You have different time spans for different things.

Q. I understand that.

A. Anywhere from five to permanent.

Q. What I mean is, in your transportation plans when you're dealing with transportation needs and different types of transportation modes you try to plan ahead twenty years, forty years, this type of length of time, is that correct?

A. This is a reasonable time span, yes.

Q. All right. And, isn't it also true of the times in your planning you would have a highway or railroad mode or another kind of mode that is in the highway law, passed in the highway law perhaps twenty years prior to actually being built or prior to construction being implemented, is that correct?

A. Yes.

Q. So that these plans that you made deal with any kind

of transportation in your chosen region, planning that may go on years and years ahead, might be on the books for years, is that right?

A. Yes.

Q. And, isn't it also true that sometimes some of these roads that are included in your plans and some of these modes are never actually implemented?

A. Right, yes.

Q. Those various documents themselves, those deal with all transportation and planning needs of the county, those documents themselves don't deal exclusively with the bridge or Lake Chautauqua, is that correct?

A. No sir.

Q. All right. Let's take the Chautauqua Lake study, about how much of this document, what percentage of this document would you use, rough estimates, that deals with the bridge itself?

A. The general plans statement itself which is the center I believe, the center fold illustration.

Q. This page, this is page V-2 and V-3 of S-17, this page is the page, these two deal exclusively with the bridge in the Southern Tier Expressway or the bridge, let's say?

A. I think it's fair to say that illustration, there's a considerable period of discussion that is not represented by the illustration.

Q. I understand. Now, looking at S-14A, the Chautauqua Lake Region part one, leafing through this there's a table of contents, you have a section on population, is that right?

A. Yes.

Q. Economy?

A. Yes.

Q Physical characteristics of the soil and topography?

A. Yes.

Q. Land use?

A. Yes.

Q. Circulation system for various types of traffic?

A. Yes.

Q. And, existing highway conditions?

A. Yes.

Q. Other modes of transportation, bus service, railroads, air and water transportation?

A Yes.

Q. Community facilities, school, recreational facilities?

A. Yes.

Q. In fact, isn't it true that in the table of contents itself, there's nowhere a specific provision or portion that denotes Southern Tier Expressway or bridge for Chautauqua Lake?

A. Yes, correct.

Q. All right. So that the bridge itself or the highway leading up to the bridge is just one possible mode among many other factors that this study dealt with, is that correct?

A. Yes.

Q. Isn't that true of all these documents, isn't this correct?

A. The plans before you are comprehensive plans trying to accurately identify the complete community structure and anticipated needs.

Q. What you're dealing actually with is plans -- with possible ways in which you alleviate possible problems into the future, is that correct?

A. Yes.

Q. All right. Now, besides that fact weren't these documents all prepared over a span of years, from '67 when negotiations started and the latest one in perhaps '71, is that right?

A. Yes.

Q. So that all of those plans were completed prior to the actual date when it would have been possible to implement and build the Lake Chautauqua Bridge?

MR. DALES: Object your Honor. This witness couldn't have any way of answering that question. It calls for a legal conclusion. He's not a State engineer and I don't think this man can answer that question.

THE COURT: I'll allow him to answer, if he feels he's able to.

MR. DALES: Do you know the answer to that?

THE WITNESS: Would you repeat it?

BY MR. LIPPES:

Q. Yes, wasn't it true all of those documents were completed prior to the point at which the Lake Chautauqua Bridge could have actually been built because of various Federal regulations and things that had to have been done after these were completed?

A. Federal regulations -- I cannot answer that question.

THE COURT: What was the date of completion of all of these plans, sir?

THE WITNESS: Sir, at one point in an election campaign we were told that the Southern Tier Expressway would be under construction in 1970.

THE COURT: When was the last date of those plans?

THE WITNESS: I believe those plans -- the last date was in 1970.

THE COURT: All right.

BY MR. LIPPES:

Q. Now, when these documents were published and distributed, was there any notification of their availability in the papers of the actual plans themselves now?

A. As a legal notice, no sir. As a statement made at a speech before the Rotary Club.

Q. Right. You say also all of the Urban Area Local and Local Planning Board meetings were open to the public as they are in our area up here, do you publish in the newspapers every time you're going to hold a meeting and what that meeting will consider?

A. No sir.

MR. LIPPES: I have no further questions. Thank you.

MR. DALES: I have one or two, your Honor.

RE-DIRECT EXAMINATION BY MR. DALES:

Q. Mr. Luensman, are you able to tell the Court whether any private people ever came to you as county planner to seek information with respect to the Southern Tier Expressway and if possible the bridge in particular?

A. We continually supply that type of information to the citizens of Chautauqua County, yes sir.

Q. And, are you able to recall any specific instances?

A. Yes, I can remember in 1971 but I couldn't give you the date now, late '71 or early '72, the representatives of Chautauqua County Environmental Defense Counsel, Sportsmen Federation of Sportsmen, I'm not sure if the Audubon Society representative was there, but they did come to my office to find out information about the bridge and at that time I had the preliminary plans and specifications on hand that the Department of Transportation prepared.

Q. Were they furnished with this information?

A. They were furnished with this information.

Q. Now, in connection with what Mr. Lippes was asking you about, the up shot of all those developmental

plans that you testified to, I gather that they're projects for the future, is that correct?

A. Yes, they're recommendations of future use, they're recommendations for local municipal acitivities. As a matter of fact the Town of Poland is now re-writing its zoning ordinance based on the zoning document that came out of that planning program. The Town of Busti is re-writing its zoning ordinance based on the proposed zoning ordinance. The Town of Kiantone is re-writing its zoning ordinance, the County of North Harmony is now re-writing their zoning ordinance based on plans that came out of that program. The Town of Chautauqua is undergoing consideration in its zoning ordinances based on what came out of that planning program, and the Town of Ellery is also considering re-drafting its zoning ordinance based on the plans that came out of that program.

Q. Mr. Luensman, are there assumptions made on projects of such things as population?

A. Definitely.

Q And --

A We have a complete comprehensive water and sewer

distribution plan that was prepared as part of the countywide planning program which is scheduled with the Bench and bears the date of 1990, and the year 2000 and we predicated upon these types of reports.

Q. Would one of the factors that goes into the projected population the transportation system that would hopefully be developed in the area?

A. The problem of transportation is crucial to planning the economy of any area so it's very basic. And, we have been keeping track of Federal regulations and funding programs and the anticipated ~~dates at~~ which the Southern Tier Expressway will be completed so that it can serve the area.

Q. As a planner, does the type of transportation feasibly affect the future population directly?

A. Definitely.

MR. DALES: I have no further questions.

THE COURT: Mr. O'Connor, do you have any questions?

MR. O'CONNOR: I don't think so.

EXAMINATION BY THE COURT:

Q. Mr. Luensman, you mentioned, I mean there was a mention of a debate at least to the Jamestown Plan?

A. Yes.

Q. Prior to its --

A. Recommendation by the advisory group.

Q. Was any of that debate involved in the location of the route of the Southern Tier Expressway or the fact that the bridge might not be built at Stow and Bemus Point?

A. All I can give you is the report of the secretary's minutes and in most instances we felt that it was -- the debate concerned other elements of the plan.

Q. Did those other types of plans which are proposals different plans than what have been offered or were there alternative plans in the event that the bridge is not built?

A. The local governments were of the opinion at the time that the Southern Tier Expressway would be built.

Q. So that there would be no alternative plan in the event the bridge was not built?

A. No, we would have to re-group.

Q. Do you know, did the consultants in preparing the

plan consider any alternative to the building of the bridge?

A. I would have to say we felt it was a given --

Q. You assumed it would be built or assumed it should be built, one of the two?

A. Right.

THE COURT: All right. Mr. Lippes?

MR. LIPPES: I have nothing further, your Honor.

THE COURT: Mr. Dales?

MR. DALES: Nothing, your Honor.

MR. O'CONNOR: Nothing your Honor.

THE COURT: Thank you, Mr. Luensman, you are excused.

M Y R O N J. E L K I N S, after being duly called and sworn, testified as follows:

MR. DALES: Your Honor, before Mr. Elkins begins, could I ask the Court's indulgence so I could have marked for identification three documents?

THE COURT: Certainly.

(Whereupon, three documents were then received and marked Exhibits S-19,S-20A

and S-20B for identification.)

DIRECT EXAMINATION BY MR. DALES:

Q. Mr. Elkins, tell the Court, sir, by whom you're employed?

A. Yes, I'm the director of the Western District Office of New York State Office of Planning Services.

Q. For how long have you been in that capacity?

A. Director of this office since August 1969.

Q. Now, during the period of time has the nomenclature of this office changed?

A. Yes, it has. In 1969 the office was known as the office of Planning Co-ordination and in 1971 the office of Planning Co-ordination was changed by State Legislation and the office of Planning Services was created in its place.

Q. And, I gather, sir, that you have continued with one or the other of those State agencies throughout this period?

A. That's correct. Mr. Elkins, I'm going to show you Exhibit 19 for identification and ask you if you can identify that document?

THE COURT: S-19?

BY MR. DALES:

Q. S-19?

A. Yes, this is the New York State Appalachian Program Development Plan dated January, 1968.

Q. Would you tell the Court very briefly what that is?

A. Yes, sir. Under the provisions of the Appalachian Regional Act for States participating in the Appalachian Regional Program are required to prepare a determinnant plan as a basis for participating in the Appalachian programs, in other Federal programs.

Q. Is this one of the documents necessary to satisfy the requirements of the act?

A. Yes, it is.

Q. And, was it prepared by the office of Planning Services

A. Yes, the office of Planning Services, it was approved by the office of Planning Co-ordination at that time as the office of Planning Co-ordination was the official State agency of New York State to be responsible for the Appalachian Program.

Q. Now, is the Appalachian Program restricted, Mr. Elkins, to simply the Southern Tier Expressway?

A. No, sir, there's a wide range of various grant

programs that are permissible under the act and grants can be made for a wide range of activities including the building of a BOCCES Center for example, various help facilities, the planning on the nature of the States since Appalachian covers a very large region. However, I'll say that transportation is the key element through the entire Appalachian Regional Program and is a major funding element of the Appalachian Commission.

Q. Is Chautauqua County in that program?

A. Yes, fourteen, I believe fourteen counties of New York State are in the program. There were originally fourteen and one additional was added a few years later.

Q. What is the primary goal of this Appalachian Program, sir?

A. The primary goal is to bring about economic resources in a Appalachian region, to make the area an economically better place to live for the people within that area.

Q. As part of this goal, is the Southern Tier Expressway included?

A. Yes sir. The transportation element of the Appalachia

Regional Plan for the State of New York includes the Southern Tier Expressway as the transportation link.

Q. What is the date of the exhibit you have before you, S-19?

A. This is dated January 1968.

Q. Was this actually submitted to the Appalachian Regional Commission?

A. Yes, sir.

Q. And, did it require their approval?

A. In the sense that it becomes a basis when the Appalachian Regional Commission meets for the approval of any Appalachia funds for the program. It would have to be consistent, which this document is.

Q. And, this was submitted in 1968, I believe you said?

A. Yes, January, 1968 is the date.

Q. And, is there included in this department plan the Appalachia corridor for the Southern Tier Expressway?

A. Yes, it is shown.

Q. Does it include the bridge concept?

A. Yes sir, it does.

Q. Is that shown by a map in there?

A. It is shown in here and a map of that area of the Appalachian region.

Q. Is that document, sir, a public record or public document that's been distributed?

A. Yes sir, it is.

Q. And, was it distributed?

A. Yes, it's been distributed throughout New York State Appalachian region to the units of the local government to the United States Senators, to the Federal representatives within that region, also to New York State Legislatures for the Appalachian region and to people who have requested the document. And, individual planning boards would receive it.

Q. Do you have any figures, sir that would enlighten us as to the number of copies of this publication that were distributed?

A. This particular document, in checking with our people in Albany, since our Appalachia center staff is there, they indicated to me that this particular document is, approximately six hundred and fifty copies were distributed within thirteen Appalachian counties. They were initially distributed to approximately fifty within Chautauqua County and

this is the best of my judgment at this time.

Q. If someone walked into your Buffalo office and asked for a copy of that, would they be, at the time it was available, would they have been given a copy?

A. Yes, if I had any additional copies, it's now out of print. I believe we have copies in our office.

Q. Was this a requirement that they be made freely available?

A. It is a public document that's been furnished with public funds and therefore has to be available. It's in the libraries in the Southern Tier as well as our own library.

MR. DALES: I offer S-19 in evidence.

MR. LIPPES: Same objection as to relevancy.

THE COURT: Same ruling, put it in evidence, please.

(Whereupon, Exhibit S-19 for identification was then received and marked S-19 in evidence.)

BY MR. DALES:

Q Mr. Elkins, I show you Exhibit S-20A and S-20 B for identification and ask you if you can identify those documents?

A. S-20A is a New York State Development Plan One

published by the office of Planning Co-Ordination I believe January, 1971.

Q. And, what does it represent, sir?

A. This represents the suggested plan for the entire State of New York and is to be used as a guide by New York State agencies in their functional planning activities and the State involvement within the State and also forms the use by New York State Planning & Development Regions and other planning bodies as guides to their own planning.

Q. And, does it include the Appalachian region in it?

A. Yes sir, it does.

Q. Was it submitted to the Appalachian Regional Commission?

A. Not formally in that of course this is a New York State wide plan which covers more than Appalachia. However, it is funded in part by a Federal government, the Department of Housing and Urban Development and therefore, it was formally submitted, and certainly did go to the -- our Appalachian Regional staff.

Q. Does it include as part of its plan, development of the Southern Tier Expressway?

A. Yes, sir.

Q. And, does it include as part of the Southern Tier Expressway the corridor, one running across Lake Chautauqua?

A. Yes sir, it does.

Q. And, is this included in there by way of a map?

A. Yes sir.

Q. It is shown on a map?

A. Yes sir.

Q. Would you explain to the Court what S-20B is?

A. Yes sir. S-20B is an insert. It is a map showing the New York State Department Plan proposed, 1990, land use and settlement density. It's a wall map covering the entire State. It's an insert of the document.

Q. Is it part of 20-A?

A. Yes sir. Within the document the map is broken down by our planning and development regions.

Q. I gather, Mr. Elkins, this developmental plan encompasses more than just highway development?

A. Yes sir.

Q. And, could you tell us a little bit about what it does encompass?

A. Yes sir. It is basically a policy plan directed

towards appropriate retention of biological shorelands in terms of future urbanization so that the plan reflects identification of New York soils and attempt to interrelate urban areas to agricultural lands, rural and non rural. As I indicated it identifies what should be preserved, what should be developed and recommendation as to how this comes about.

Q. Is this transportation system a factor which is taken into account in the planning process here?

A. Yes sir, it is.

Q. Is it an important factor, a transportation system?

A. It's extremely important.

Q. Was this document distributed publicly?

A. Yes sir, approximately eight thousand copies of this report has been distributed. It was initially released with press releases from the government, copies went to all Federal, State and local government and to planning boards and it was clearly made evident that copies were available by writing the New York State office of Planning Services either in Albany or in the proper district office.

Q. Mr. Luensman would have gotten a copy, I gather?

A. Mr. Luensman received a copy.

Q. Is there a list for these types of things?

A. Yes sir, it is kept by our Albany office but it would include those that I so indicated in terms of official copies to elected officials and perhaps boards and specific libraries. Copies were sent to major newspapers throughout the State at the time it was to be released.

Q. Is it cleared through the State Clearing House or through the office of Planning Services?

A. It is cleared by the office of Planning Services.

MR. DALES: I offer Exhibits S-20A and B in evidence, your Honor.

MR. LIPPES: Same objection.

THE COURT: Mark it in evidence, please.

(Whereupon, Exhibits S-20A and S-20B for identification were then received and marked S-20A and B in evidence.)

MR. DALES: Would you mark this please?

(Whereupon, a document was then received and marked Exhibit S-21 for identification.

BY MR. DALES:

Q. Mr. Elkins, I hand you Exhibit S-21 for identification

can you identify that, sir?

A. Yes, sir. This is a New York State Appalachian Development plan dated January, 1971, published by the State office of Planning Co-ordination.

Q. And, what does the document represent, sir?

A. It represents the twenty year plan for the fourteen counties of our Appalachian area. It is the basis for detail development guidelines and is used by the State as a basis for public investment and development programs, and with the Appalachian Regional Commission for seeking Appalachian fundings.

Q. Does it have any relationship to 1968 development plan?

A. Yes sir, it is a type of up-date, we're required to submit an up-date plan. This document becomes more defined, more detailed as time permits and this 1971 was a combination of a wide range of planning studies undertaken by the Appalachian Regional Commission.

Q. So that it is stages of the 1968 plan, in effect?

A. Yes sir.

Q. And, it was required to be submitted to the Appalachian Regional Commission?

A. It was submitted to the Appalachian Regional Commission.

Q. It was required by law?

A. Yes sir.

Q. It was prepared under the offices of the office of Planning Co-ordination?

A. Yes sir.

Q. Does it include as part of its planning process the Southern Tier Expressway?

A. Yes sir.

Q. And, basically, the same concept it was included in 1968 plan?

A. Yes sir.

Q. And, I gather that you would include the bridge, it shows crossing of this Lake Chautauqua?

A. Yes sir.

Q. Did this have the same public distribution as the previous report?

A. It had greater distribution than the 1968 document. As I understand from my Albany office approximately twenty-five hundred copies of the plan, 1971, was circulated, approximately one thousand of these within the Appalachian Counties itself.

Q. And, would it go to all municipalities?

A. It would have gone to what I stated previously, our Federal, State and Legislatures and to our local government municipalities in their planning boards, libraries and general newspapers, and to any interested parties who requested.

Q. And again, was this a free document, somebody could walk into your office and ask for it?

A. Yes, sir.

MR. DALES: I offer Exhibit S-21 in evidence.

MR. LIPPES: Same objection.

THE COURT: Mark it in evidence over your objection.

(Whereupon, Exhibit S-21 for identification was then received and marked Exhibit S-21 in evidence.)

CROSS-EXAMINATION BY MR. LIPPES:

Q. Mr. Elkins, on S-19, New York State Appalachian Program, 1968, do you know how much time is spent in that document on the Lake Chautauqua Bridge?

A. No, I couldn't answer that.

Q. Specifically --

A. There is with respect to that portion of the Appalachian region, that includes Lake Chautauqua, a map and there's reference to the Southern Tier Expressway and it shows a corridor across the lake.

Q. I understand that, but I'm asking about the bridge, would you say that a page of this document deals with the bridge?

A. I don't believe that it's focused as a specific discussion of the bridge.

Q. In other words, what this document includes is one map showing that there is a corridor over the lake, is that correct?

A. That's correct.

Q. And, this is a hundred and seventy-nine page document, let the record indicate. Now, New York State Development Plan One, this is S-20A, is this the same thing, one map showing the corridor over the lake?

A. There is a section of the report dealing with the Southern Tier Expressway region, there is a map of the Southern Tier region and it shows a corridor and a bridge across the lake.

Q. Okay. Let the record indicate this is a hundred and

twenty-eight page document. And, S-21, a 1971 document, is that the same thing, a map showing the corridor?

A. There is again, a map of the thirteen -- fourteen counties of the Appalachian region by our planning department region.

Q. Let the record indicate this is an eighty page document.

MR. LIPPES: No further questions, thank you.

THE COURT: Mr. Dales?

MR. DALES: No questions.

THE COURT: Mr. O'Connor, do you have any questions?

MR. O'CONNOR: No questions, your Honor.

EXAMINATION BY THE COURT:

Q. Do I understand, Mr. Elkins, that your testimony was of those documents in evidence the only reference in there is to a map and it's assumed that is going to be a bridge there, is that right?

A. The bridge is part of the total plan, there is a Southern Tier Expressway and the Southern Tier Expressway crosses Lake Chautauqua.

Q. There is no discussion in the exhibit as to whether the bridge itself is good or bad for any type of situation?

A. No sir, best of my knowledge there is not.

THE COURT: Okay. Anything further? Thank you, Mr. Elkins. Off the record.

(Discussion off the record.)

(Whereupon, a luncheon recess was then taken at twelve P.M.)

(Proceedings taken after luncheon recess, commencing at 1:45 P.M. Appearances the same as before noted.)

THE COURT: Ready to go, Mr. Dales?

MR. DALES: Yes, I am.

THE COURT: Mr. O'Connor?

MR. O'CONNOR: Ready to do.

THE COURT: Mr. Lippes?

MR. LIPPES: Yes, sir.

THE COURT: Let's go.

MR. DALES: The State calls Philip Gravink.

P H I L I P T. G R A V I N K, after being duly called and sworn, testified as follows:

DIRECT EXAMINATION BY MR. DALES:

Q. Mr. Gravink, where do you reside?

A. I reside in Clymer, New York.

Q. Would you tell the Court briefly where that is in regards to, let's say Jamestown, Bemus Point --

A. Yes, it's the southwesternmost village in Chautauqua

County, the Township of French Creek our business is. The next township to the west of the Village of Clymer where I reside is French Creek, being the southwesternmost township in the State of New York.

Q. And, what is your occupation, Mr. Gravink?

A. I'm Chairman of the Board and General Manager of Peek 'N Peak Recreation, Incorporated.

Q. Do you belong to any trade organization in connection with your business?

A. Several. For the past two years, I've been President of the New York State Skiing Area Operators, I'm Vice President of the New York State Winter Sports, Incorporated, and I'm Vice President of the Eastern Ski Area Operators National.

Q. Are you a member of any local groups?

A. I'm a member of the School Board, past member of the Chautauqua County Planning Board.

Q. During what period of time were you a member of the Chautauqua County Planning Board, Mr. Gravink?

A. A two year term up until I believe two years ago.

Q. Do you have a business in which you operate in Chautauqua County?

A. Yes, sir, Peek 'N Peak Recreation, Incorporated.

Q. What is its business?

A. It was organized in 1964 by a group of five local businessmen who were the principal investors. We sold some shares of stock to approximately a hundred local people at that time and developed Peek 'N Peak Ski Center. It grew into approximately a hundred local people at that time and developed Peek 'N Peak Ski Center. It grew as a daily resort, a day ski area resort until we started planning for a more expanded recreation facility about five years ago. Subsequently we changed our name, our original name was Southern Chautauqua Recreation, Incorporated, and in 1971, well, let's say the period of 1969, '70 and '71 we did extensive planning, both financial and physical, and were registered into the national over-the-counter market in March of 1971, where we raised a million and a half equity capital from the sale of stock, publicly and negotiated bank loans something over two and a half million for four million dollars expansion program.

Q. Before you go into that, Mr. Gravink, would you tell the Court a little bit about the impact of the ski business in Chautauqua County on its economy?

A. Well, I feel that it's one of the few that can show on its growth in the Chautauqua County-Cattaraugus County, Allegany County region in the last several years, taking the winter recreation business as a whole or resort business as a whole, including vacation homes, we're the largest employer in the western four counties. Today we have seasonal employment, about three hundred and thirty some last week. We'll have a payroll this year, direct payroll of something just short of a million dollars.

Q. Is there any influx of transient money that is made by reason of this business?

A. As a day ski area and not so much now that we're totally year-round, but as a day ski center, based on the license plate count in our parking lots of last year, out of a hundred and ten thousand skiers, ninety-three percent were from out of state.

Q. Do we have any figures, or do you know of what this means in terms of money that was spent in New York State because of those ninety-three percent of your patrons coming from out of state?

A. Well, putting on my area operator's hat, a very large percent of the New York State ski market is from

the west and south, normally flat terrain states with poor snow conditions, such as Ohio, Michigan, Pennsylvania, Southern Pennsylvania, we have busloads from as far as Wheeling, West Virginia. We have buses scheduled in weekends from Columbus, Ohio. Twenty buses from Cleveland and Pittsburgh.

Q. Did there come a time, Mr. Gravink, when the scope of the services which you would be offering to the public changed?

A. Very definitely, due to the overhead and other reasons we figured the amount of the cost that had to be invested on equipment, quality equipment from eighty to a hundred thousand and based solely on the physical weather conditions, we made a determination to go year-round in scope as a designation resort where we're offering skiing, golf, swimming and tennis, all of first quality.

Q. When was that decision made?

A. About, coincidentally with the, in the occasion and in fact moving of earth for the occasioned west of Chautauqua of the expressway, namely the first of 1971 and -- '70 and '71.

Q. And, in furtherance of this new area that you were

stepping into, did you take any steps?

A. We did considerable amount of planning, if that's what you're referring to in both land use, land acquisitions, we retained the services of a firm of Lesco Associates of Cleveland to do the master plan feasible study in the years of 1970 and '71. We have later now worked with the firm of Beardsley Davis of Denver, Colorado, and they're doing our land planning, master plan for us now.

Q. I see. Mr. Gravink, these services weren't free?

A. By no means, probably the total planning and feasibility studies, we invested between eighty and a hundred thousand.

Q. Now, did there come a time when your plans had reached the state that you were in need of venture capital?

A. Yes, indeed. We spent again, in the later part of these years of '71 and early '72 in finding underwriters to obtain venture capital at that time and finally made a determination with the firm of Jay and Russell, Cleveland Underwriters, who helped us in procuring the status of national over-the-counter stock sale.

MR. DALES: Your Honor, may I have this document marked for identification?

THE COURT: Surely.

(Whereupon a document was then received and marked Exhibit S-22 for identification.)

BY MR. DALES:

Q. Mr. Gravink, I show you Exhibit S-22 for identification and ask you if you can identify that, sir?

A. This is our prospectus, the form approved copy dated March 21, 1972 under which we offered for sale one million three hundred and eighty thousand dollars worth of common stock in our company at five dollars per share.

Q. What was the date of that, sir?

A. March 21, '72.

Q. Is this the first prospectus that would have been circulated?

A No, this was subsequent to, I believe three preliminary prospectus, that was the pre-selling documents to the approved prospectus.

Q. When you say approved prospectus, who approved it?

A. The Securities Exchange Commission and the State Department of various states in which we chose to

to register, I believe twenty-one states.

Q. Including New York, I assume?

A. Among New York, Pennsylvania and Ohio, yes.

Q. The covering dates on this particular prospectus which is, I believe you said --

A. March 21, '72.

Q. That's the final prospectus?

A. That's right. That represents the sale as it finally occurred.

Q. I gather that you got your money from that offering?

A. Yes, indeed, the offer was oversold and tied to this offering were commercial bank loans of, well -- that was this prospectus they're tied in something like -- I would have to look it up to say for sure, something like a million and a half, it's described there, two million and a half, so due to overruns, we had a total tied to this, bank, commercial bank loans, the public sharing of two and a half million.

Q. Is this considered a public document, Mr. Gravink?

A. Yes, indeed.

Q. Anyone who was interested in buying your stocks would have to be supplied a copy of this?

A. That's right, this was the sales document.

MR. DALES: I offer Exhibit 22 in evidence, your Honor.

THE COURT: Why don't you ask some other questions, as to where it's relevant?

BY MR. DALES:

Q. Well, your Honor, perhaps we can show that there is a part of the prospectus which includes a map showing the area which we've ventured capital is seeking to exploit if I can choose that term, and let me go back, your Honor, and develop this, I'm going to withdraw the offer at this time. Mr. Gravink, is there a map included in the prospectus?

A. Yes, Page 10 of the offering, obviously it's very important that there are good roads on which to travel to that destination and resort. We felt a very important piece of information to our prospective buyers was necessitated in the facts by the underwriters and our attorneys and SEC was to disclose as to how to travel to the resort, and on Page 10 we outlined a map denoting the areas around us, such as Route 90, Interstate 79, U.S. Route 6, and indicated the metropolitan areas of Cleveland and Pittsburgh and Buffalo with radius lines of thirty, sixty, ninety and a hundred and twenty miles. And, we also

indicated by dotted lines the route and alignment of the proposed Southern Tier Expressway. Note number one, from a point to the New York section of the Southern Tier Expressway, New York, plans under discussion. And, note two is the Southern Tier Expressway, plans proposed.

Q. All right. Now, did the Southern Tier Expressway play any part first in your decision to go ahead with this new part of your venture?

A. This was a terminal decision and we feel it was a key point of the disclosure which our prospectus offered.

Q. Why?

A. The necessity of good safe routing for both high volume of ski traffic in adverse weather conditions and the constant flow of year-round tourist traffic and good alignment and direct roads from the metropolitan areas from which we seek our tourist trade.

Q. And, is this in essence then a presentation in the representation in the prospectus that a road --

A. That roads of this nature were proposed and under construction.

Q. Is it your testimony, sir, that the completion of the road is essential to the business as you have projected it?

A. Absolutely.

THE COURT: Did you say, sir, that the map indicated under Southern Tier Expressway were under construction or under discussion?

THE WITNESS: Under construction.

THE COURT: I'm sorry, I had the word discussion. Go ahead.

BY MR. DALES:

Q. You said that you did receive this capital from the stock offering?

A. Yes.

Q. And, you said, I believe, you did receive the bank loans?

A. Yes, sir.

Q. And the bank loans were predicated on the initial sale of this?

A. Yes, sir.

Q. What have you done with this money?

A. We have completed phase one of our resort development as outlined in the master plan.

Q. What is phase one?

A. Phase one is a sewer plant, a water distribution system, potable, potable water distribution system,

eighteen hole championship golf course, indoor tennis facility of two courts, indoor swimming and sauna and exercise facility. Six hundred and three bedroom suites and dining room and, containing lounge facilities which will seat in both a public dining room, a lounge and coffee shop and five convention rooms of about four hundred persons.

Q. Are these facilities open?

A. They were open since October 1st, sir.

Q. And, do they depend in some part, does their success in some part depend on the completion of this road?

A. They did at the time we proposed it and they still do.

MR. DALES: Your Honor, I now make my offer, I think I've shown relevance of this there's been reliance on this proposed road as indicated by the witness' testimony, I believe there's relevance to the issues here.

MR. LIPPES: Your Honor, I would still object as to relevance, there's been no testimony as to the bridge for the Southern Tier Expressway. Moreover, your Honor, this is a private company and private corporations often

make decisions that may or may not be considering Governmental actions. Whatever happens to Peek 'N Peak will not have anything to do with any bridge to the State which is an issue in Laches, and I just feel it's tenuous at best.

THE COURT: It's my understanding, based upon the question of this witness, this relevancy of this exhibit has been pretty well put in evidence by oral testimony, sustain the objection. There's been in testimony reference to this Southern Tier Expressway, and as I understand the prospectus does not relate to the Southern Tier Expressway but general economic factors involved in the prospectus itself.

MR. DALES: I would take issue, your Honor, with Mr. Lippes' statement that this private party is --

THE COURT: That was argumentative.

MR. DALES: I would say that.

THE COURT: Sustain the objection as to its introduction into evidence.

BY MR. DALES:

Q. Have you incurred any expenses subsequent to the offering?

A. Yes, indeed, we have continued to go with the firm belief that the road was going to be constructed. We have purchased additional land and magnitude of, in options, purchases probably eight hundred acres, both contiguous and nearby. And, we have retained the firm of Beardsley Davis Associates, a resort planning firm from Denver to continue to keep our development if and when it does have an opportunity to grow, astride with the present phase of planning such a resort. These future phases of more rooms, condominiums, of additional skiing facilities and tennis facilities and other service facilities in line with both vacationers, conventions and country homes, are all contingent upon the use of the portion of the expressway closest to us when that's joined from both east and west.

Q. Do you have any dollar amounts that you could give us as far as your expenditures in this regard?

A. Land purchases, perhaps three hundred thousand, options, of course, rather dubious at this stage

in planning, fifty thousand plus, subsequent to the planning that went into the phase one.

MR. DALES: Thank you, I have no further questions of this witness.

THE COURT: Mr. O'Connor?

MR. O'CONNOR: No questions.

THE COURT: Mr. Lippes?

CROSS EXAMINATION BY MR. LIPPES:

Q. Mr. Gravink, may I ask you if that prospectus was fully subscribed?

A. It was over-subscribed.

Q. In fact, you sold all your stock, is that right?

A. At that original time we did.

Q. All right. That underwriting was not contingent, the sale was not contingent upon the road being completed and bridge being completed, is that right? There's no way for the stockholders to get their money back?

A. No.

Q. Now, tell me, you say you started this corporation in 1965 or thereabouts?

A. '64.

Q. Could you give me any estimated growth percentages from '64, let's say, to '69, of the time when you started planning for your expansion?

A. I could offer you a chart from our annual report.

Q. Why don't you just read me the growth figures, or give me a rough estimate, it's in the prospectus, I'm sure.

A. Yes.

MR. O'CONNOR: Your Honor, if we're going to get testimony from the prospectus, I think it should be put in evidence.

MR. LIPPES: He's using it to refresh his recollection.

THE COURT: He's using it to refresh his recollection.

THE WITNESS: You're asking gross revenue dollars?

BY MR. LIPPES:

Q. Any way you want to put it in terms of growth.

A. I'll give you the skier attendance that is in our prospectus.

Q. Sure.

A. The year '64, '65 ten thousand skiers. '65,

'66, sixteen thousand skiers. '66, '67, twenty-nine thousand. '67, '68, forty-six thousand. '68, '69, sixty-nine thousand. '70 -- '69, '70, a hundred and thirty thousand. '70, '71, a hundred and seventeen thousand.

Q. All right. Now, Mr. Gravink, you said that you reached the point where considering your overhead and considering the fact that you were open only during -- for day skiing and considering the nature of your operation, you had made a decision that you should expand to a year-round operation, is that right?

Q. It was one of the contributing facts too, plus development of the area from the standpoint of highways.

Q. The fact that a new highway was going to be built was not your only consideration, there were many considerations?

A. You don't decide to spend four million dollars on any

small decision.

Q. That's right. Okay. Now, in fact your corporation had had a tremendous growth without the building of any new highways, isn't that right?

A. It's relative, yes.

Q. Now, tell me this, to what importance a bridge across the lake is to your future plans, the bridge itself to the Southern Tier Expressway?

A. Only in that it's a part and a chain is no stronger than its weakest link. Without that as an Interstate quality highway, giving access to our skiers from both east and west within three to five miles of our property our plan is not a viable plan.

Q. If in fact the bridge was not built but an alternative going south of the lake, going around the lake was built, would this fulfill your transportation needs for your future plans of a comparable highway?

A. An alternative going south of the lake and staying in that same proximity, any major highway would be acceptable if in fact it was able to be done in a reasonable time. It's my understanding that re-disigning is eight to ten years and our debt service alone is a thousand dollars a day and I don't think

I can live long enough to wait for the day when it's redesigned south of the lake. I also, if I could, would have some strenuous objection to its alignment south of the lake because our plan encompasses, incorporation with the French Creek Planning Board and in our own land acquisition and options, an area that covers the whole valley in front of our ski area and one of the most devastating effects would be a realignment suffered in Vail, Colorado, where it completely ruined the whole valley.

Q. I understand that. All right. Can you give me an estimate of -- currently, how many people, how many skiers you expect this year?

A. In assuming the weather?

Q. Right.

THE COURT: That's a big assumption.

THE WITNESS: Conservatively, a hundred and forty thousand.

BY MR. LIPPES:

Q. So, you're taking that, giving the existence of the roads today, a hundred and forty thousand?

A. Allowing for the weather and economic conditions.

Q. But, what you're saying is that apparently given

proper weather conditions you're estimating a hundred and forty thousand people on the existing roads can get to Peek 'N Peak?

A. Yes. And not just the factor of there being a specific amount of snow fall like last Saturday where we finally did get a nice snow fall, it came on Saturday morning and with the poor alignment of Route 43 which happens to be Pennsylvania, and the particular trouble spot of that particular day was a secondary road and that's our main access road and we had cars backed up for two miles for over an hour and a half before any of the cars got through. These cars had they arrived at the parking lot represented forty dollars per car. Many of those returned, they never reached the area because of the inadequate roads into the area.

Q. Can you give any estimate -- well, what roads are concerned here being used?

A. It's a list of possibly twenty or thirty indirect routes.

Q. How many secondary roads?

A. All secondary roads, after you leave I79, I90 you're on your own.

Q. Is it your testimony that the Southern Tier Expressway will directly have an interchange into Peek 'N Peak?

A. It will have an interchange within three miles of us and then there will be a rebuilt access road if plans would have gone according to the timing that we anticipated at the time we decided to spend four million dollars.

MR. LIPPES: I have no further questions.

EXAMINATION BY THE COURT:

Q. There's a map on the wall, I believe Exhibit S-1, would you put a little mark where your recreational area is? I'm not exactly sure where it is in relation to this expressway?

MR. DALES: Perhaps a red pen would show.

BY THE COURT:

Q. Put in red pen, just put a P and P or something. Did I understand your testimony in reference to the fact that if a Southern Tier Expressway were re-located south of Chautauqua Lake that there would be some destruction of the esthetics of the valley in there?

A. My main concern, your Honor, is with the timing of that type of relocation and also as a taxpayer of Chautauqa County, if that portion were realigned I believe a section A, that would have to be abandoned and that is already constructed. If it were to be realigned closer to us in fact so close that it abutted the foot of our hill, it would have very, very serious affect on months of planning.

Q. That relates to 5-A, Section 5-A of this proposed road?

A. I'm not sure of the numbers. The westernmost end which has aligned work done.

Q. In other words, if there were a realignment of that portion of the road running from Stow along the southern portion of the lake to Jamestown it would not affect the esthetics of your ski area?

A. Yes sir, that's correct.

Q. Or the economics of your ski area?

A. The economic, from a standpoint of delay.

THE COURT: All right. I have nothing further.

MR. O'CONNOR: May I ask some questions?

THE COURT: Sure.

DIRECT EXAMINATION BY MR. O'CONNOR:

Q. I would assume that from what you described that you had in mind the availability of this highway at some particular time when you made the stock offer you talked over with your underwriters and you made the decisions to expand the proceeds of the stock offering and the expansions you made, what generally were you thinking of in terms of availability of that highway?

A. Obviously we did not figure the time right when we felt it would be completed.

Q. I'm talking about your own mind, what was your expectation?

A. My recollection is that we had considerable communications with the Department of Transportation and also from Penn. DOT, in Pennsylvania. And, as to our expectation, in our planning documents we had hopes of using the road as early as 1975 or '76, this was a 1971 projection. I believe this was of course before the defeat of the Transportation Bond issue.

Q. All right. Now, you mentioned the fact that lots of your customers were from the immediate west flater

areas from the south where it's warmer, but do you also get customers from well, towns like Binghamton Elmira, Corning?

A. Yes, sir, we do. I have to say it's a very small portion of our day skiers. Happily though I would say Jamestown and points east and north are proving to be very viable users of our hotel facilities. We have already had some convention business from east and north and we feel it's very, very important to us and to the resorts to the east, it's very important that there is a chain of resorts in order to really become viable in the resort business. And, they of course would be looking to that same busy market in areas like Sinclairville, Ellicottville where multi million dollar expansions have also taken place. And, I think they should be represented in this way and I do that as association president.

Q. All right. Now, you mentioned the initial offering of your stock, has it been traded publicly since that offering?

A. Yes, it's traded actively.

Q. Well, by actively, is it traded every week or every month --

A. Oh, yes.

Q. How about every day?

A. About eight, ten thousand shares a week.

MR. O'CONNOR: I have nothing further, your Honor.

THE COURT: Mr. Gravink, I believe -- this is for my own purposes, I believe there was a statement by you to the Chautauqua County Legislature and it's part of your appendix K?

MR. DALES: That's correct.

THE COURT: Of Exhibit S-2 which is in evidence, and shows a plan of the Board of Peek 'N Peak Recreation, Inc.?

THE WITNESS: Yes, sir.

THE COURT: Anything further of this witness?

MR. DALES: No further questions, your Honor.

THE COURT: Do you have another witness at this time?

MR. DALES: Your Honor, I think Mr. O'Connor has a witness.

THE COURT: Mr. O'Connor?

MR. O'CONNOR: At this time I'll call Don Bestgen.

D O N B E S T G E N, after being duly called and sworn,

testified as follows:

THE COURT: Mr. O'Connor, the affidavit of Mr. Bestgen has been submitted in evidence, I believe it's marked Defendant's F-1?

MR. O'CONNOR: Yes. I have reviewed it, again I noticed although it's called an affidavit there's no place for him to sign it, no place for anyone to enter a sworn to, but showing you Exhibit F-1, I ask you if you recognize this as a statement that was prepared by you?

THE WITNESS: Yes, it is.

DIRECT EXAMINATION BY MR. O'CONNOR:

Q. And, have you had a correction made within that statement, a minor correction relating to the length of the bridge?

A. There is a minor correction made at item number four, concerning the length of the structure over Chautauqua Lake Bridge, it's shown as one point sixty-five miles in the affidavit and the actual

length is about eight-tenths of a mile.

Q. And, as to the overall length of the segment, have you also indicated there was an approximate figure?

A. Approximately two point five two miles.

Q. Have those corrections been made by an ink designation, is that correct?

A. Yes, they have.

Q. Other than that this is your statement under oath, is that correct?

A. That's correct.

MR. O'CONNOR: I have nothing further, your Honor.

THE COURT: It's my understanding, Mr. Lippes, that it's acceptable to you that the affidavit or statement designated as F-1 can be put into evidence and there is no need for direct examination of this witness, but you of course wish to cross-examine, is that correct?

MR. LIPPES: That's correct.

THE COURT: All right. Fine, go ahead, Mr. Lippes.

CROSS-EXAMINATION BY MR. LIPPES:

Q. Mr. Bestgen, your position is division engineer?

A. That's correct.

Q. For the F.H.W.A.?

A. Yes.

Q. You say that in your position you are responsible for the Federal Highway Programs in New York State and that you, on page two interpret and apply policies and procedures currently in effect to the various functional areas of the highway program such as planning, research and development, design, right-of-way, construction and maintenance, is that correct?

A. That's correct.

Q. Would your authority also include the receipt of or the preparation of in any way documents that would come under NEPA or the Department of Transportation Act Section 4-F or any hearing procedures?

A. That's correct, I have the responsibility for processing those documents.

Q. All right. Now, on page four of your document, discussing public hearing held in 1965, you stated that, "Material presented to you was duly recorded and quite full consideration was given to the economic

affects of the highway location and to the economic benefits to be derived therefrom." Now, I would imagine, and I want you to correct me if I'm wrong, that you were following the current mid '60's procedure to decide whether or not the economics was acceptible in terms of transportation and cost, is that right?

A. We were working under our policy and procedure memorandum twenty-eight, which at that time required a certification to that effect from the State Highway Department.

Q. And, under twenty-eight, again, correct me if I'm wrong, the consideration that had to be certified were economic considerations rather than later considerations of associated costs and other types of costs, is that correct?

A. In that time we were primarily considering economic considerations.

Q. Right. Okay. Has there ever been a hearing, a public hearing to consider any other costs other than economic costs? I'm specifically alluding to the associated costs, environmental costs?

A. The original hearing of course would allow testimony

there hasn't been any way really to qualify the social environmental costs as such.

Q. Let me ask you this, has there been, since '65 any procedures implemented that would delve into environmental and social costs?

A. The National Environmental Acts in 1970, the Federal Highway Administration implemented -- we were required to implement that act in our program which requires exploration into environmental areas.

Q. Besides NEPA, are you familiar with the terms expanded hearing or design hearing?

A. I'm familiar with the two hearing process.

Q. Would you explain what the two hearing process is?

A. All right. The original policy and procedure memorandum that we're working under, that was issued in 1956 and modified in 1959, that was the Federal Highway Administration procedure, that was implementing a section of Title 23 of U.S. Code. We dealt with the public hearing, that section of the law requires a public hearing.

Q. Section 128?

A. 128, that required a single hearing and the Federal Highway Administration through the vehicle of its

policy and procedure memorandum required one hearing. Subsequently then I believe in January of 1969 we developed another updated policy. It's actually a new policy or procedure memorandum twenty-eight dealing with the subject public hearings. And, in that policy directive the law hadn't included, did not require two hearings. Our Federal Highway Administration directive ended up a two hearing process. The first hearing was considered to be a corridor public hearing, you considered alternate corridor locations and then after the project had progressed to a later stage of development you hold a second hearing called a design hearing that would lend itself to discussing design issues, such as number of lanes, numbers of interchanges, type of bridges and things of that sort.

Q. And then, it is your testimony that in a design hearing social and environmental costs are not, were not mandated to be considered?

A. Well, the purpose of the public hearing is to present the information to the public and give the public the opportunity to comment on the proposal and any type of you know, testimony given at a public hearing

is satisfactory and welcome.

Q. What I'm getting at is it wasn't mandated by the Federal Highway Administration that these areas be developed into?

A. You mean -- one second, yes, I believe in the new issue PPM twenty-eight, some twenty-three points, economic, social and environmental to be addressed in a provision development is to be presented at the public hearing.

Q. All right.

A. I may add that I believe recently in the Federal register that the Federal Highway Administration, they're considering going back to the single public hearing and that has been published recently in the Federal register.

Q. All right. Now, did -- that two hearing process was not used concerning this section, 5-C?

A. No, it wasn't.

Q. All right. Now, on page five number fourteen of your statement, you state,"The NYSDPW responded to the request contained in the BPR's February 20th, 1967 letter mentioned in twelve above by submitting a report to the BPR by letter dated March 27th, 1967

(Exhibit 12) which reflected the NYSDPW's analysis of the comparative merits of three alternate lake crossing sites in the general area of Stow-Bemus Point." Is it my understanding, is it correct that the alternates that were instituted all dealt with a crossing somewhere on Lake Chautauqua?

A. Well, this activity or this action took place after the Federal Highway Administration had given location approval which was a general corridor, then what the report is referring to, the actual site of the lake crossing and there were three alternative lake crossings considered. And, this was the purpose of this report, we were concerned at the time about, of course economics of the crossing itself and certainly a longer bridge meant more cost than a shorter bridge, and that had to be evaluated. That was the purpose of this particular report. I believe we settled on a longer crossing because of the potential I guess, social and economic damage to the Bemus Point area.

Q. All right. Was there ever a point in terms of public hearings where a nul alternative was prepared and by that I mean a no bill alternative?

A. I don't believe it was presented as such at the 1965 hearing.

Q. And, I take it it's not been presented to them at a public hearing since?

A. That's correct.

THE COURT: Is this just relating to the bridge or relating to the whole Southern Tier Expressway?

MR. LIPPES: I'm asking about the bridge because our contention is that's the only thing in issue.

THE COURT: Fine.

BY MR. LIPPES:

Q. On page seven of your statement, you're dealing generally with clearing house procedures and you state that the materials were given to the regional clearing house. Do you know if any -- can you tell us if any materials that were sent to you were sent to any other Federal agency other than your department?

A. I can't tell you that, under this procedure, the clearing house procedures, the State Department of Transportation is required to submit the project proposal to one State clearing house and then they're

sent to other State agencies. The State of New York Department of Transportation also sends them to the regional or local clearing house and they're sent to local agencies.

Q. I'm talking about the Federal?

A. I don't know of any.

Q. Did you at any time, let's say forward any materials that you received to either any PA or CEQ or the Secretary of Agriculture, Department of Interior, any other Federal agency?

A. No requirement to do that.

Q. It's your testimony that -- is it your testimony that there's no requirement to that if the council on environmental quality or the Environmental Protection Act do not have to review environmental materials or other materials received by your office prior to PS&E approval?

A. They have to if you require an environmental impact, that has to go to another Federal agency. However, we're operating under the policy and procedure memorandum 90-1 which provided for a transition into the NEPA Act and under those procedures because of the advance stage of this project we were not

required to prepare an environmental impact statement.

Q. When you spoke about the advanced stage of this project, do you mean advanced -- in what sense do you mean advanced?

A. Advanced in the sense that the location had been approved, that design had been approved and the plans were in -- being prepared, the final plans were being prepared.

Q. You don't mean advance in terms of construction in terms of the plans?

A. The policy and procedures memorandum spells that out quite clearly.

Q All right. Are you aware of any procedure whereby under the Clean Air Act the Regional Administration Protection Agency must review any materials?

A I'm not aware that they are.

Q. All right. Are you aware of Section 4-F of the Department of Transportation Act?

A. Yes, I am.

Q Can you tell me whether or not any 4-F steps were prepared or any decision was made as to feasible or alternative?

A. No, there was no, we determined a 4-F step was not

required to the project that was none prepared.

Q. What did you base that determination on?

A. It was based on the fact that it had not been our policy to require 4-F's involving bodies of water, large bodies of water.

Q. All right. Now, I understand that there was an environmental report, paragraph 4-C of the draft, I mean, that was submitted to you, is that correct?

A. Yes.

Q. And also, there was an environmental re-evaluation supplement statement that was prepared pursuant to your request, is that right?

A. That's right.

Q. Did either of those documents, do you know to your own knowledge whether either of those documents were ever submitted to any other Federal agencies other than your office?

A. We didn't send them to any other Federal agencies.

Q. All right. Now, on page eight under number twenty-eight discussing the guidelines for implementing Section 102C of NEPA you state, "The NYSDOT submitted the required environmental evaluation to FHWA by memorandum dated September 13th, 1971. This document

provides --" I'll skip on to number three, evidence of a co-ordination of the project by New York State DOT with Federal and local governments and agencies in the general public. Could you explain what you meant by co-ordination with Federal government? Do you mean just with your office?

A. You're reading under twenty-eight?

A. Twenty-eight, number three?

A. Yes, there would be no other agency under the regulations of the Federal Act that they would have to -- under our procedure at that time, to co-ordinate with it. I think this is meant generally when sometimes you have to get a permit for a project from the Coast Guard. This case you would require this co-ordination but under the National Environmental Policy Act, we do require an environmental impact statement. We are required, that says do send it to other Federal agencies. However, our policy is national policies, Federal Highway Administration for a project of this development did not require it to be sent to the Department of Environmental Protection Agency, did not require us to submit it to other Federal

agencies unless I say we did need a permit and we did contact as I recall the Coast Guard to find out whether we needed a navigational permit and they said no, they had no jurisdiction.

Q. I understand that.

A. But, I don't recall any other Federal agencies that we had contacted on this issue.

Q. All right. Now, going over to page ten you're referring to a memorandum dated April 16th, 1973 and you said this memorandum, "Advise the New York State Department of Transportation that FHWA procedures --" I'll skip a little bit -- "Obviated the need to prepare formal environmental impact statements for projects which were already in advanced stages of development," as you testified to prior?

A. Yes.

Q. Before today. Now, I noticed that this belt -- it was after a certain amount of litigation had transpired in New York State. I assume that this entails compliance with Federal Courts in interpretation of the law, Federal law?

MR. DALES: Object to that question, your Honor.

MR. LIPPES: Someone has to be in a position to

testify as to whether duties were -- Mr. Bestgen stated he is the person who was responsible for preparation of various documents for the Federal government. Now, if he has responsibilities, I want to find out if he was -- had knowledge of certain facts.

THE COURT: I'll allow him to answer if he's able to.

THE WITNESS: All right.

MR. O'CONNOR: I think he should be asked a question whether he was division engineer at the time this particular transaction occurred because I don't think he was.

BY MR. LIPPES:

Q. Were you division engineer in April 16th, 1973?

A. Yes, I was.

Q All right.

THE COURT: Do you understand the question?

THE WITNESS: I believe so. I don't make policy even though I'm division engineer. I carry out the policies that are produced by my superiors in Washington. These come from

the policy and procedure memorandums which apply all over the country. I'm quite sure these were people who were well aware of the Court's ruling on environmental cases around the country and they have not seen fit at this point to change the procedures.

BY MR. LIPPES:

Q. Let me ask you this, are you familiar with the fact that at this late date of the ruling that an environmental impact statement must be prepared if PS&E approval was given after 1970, were you personally aware of that?

A. I'm aware of that there have been some rulings to that effect.

Q. All right. Let me ask you if there ever came a time when you called up anyone in Washington and said something to the effect of, you know, we got a project down here and there's no environmental impact statement, do you think we should have one?

MR. O'CONNOR: I object to that question. If you want to ask if he ever had such a conversation I think that is a proper question.

BY MR. LIPPES:

Q. Did you ever have such a conversation?

A. Not a specific conversation. This project came under the policy and procedure memorandum and I had absolutely no indication, I thought all environmental precautions had been taken. That there had been considerable discussions and confidences with State departments and there was no significant changes. I had no indication of any controversy of this project and there was absolutely no reason to not offer it to the PS&E for their approval on the project.

Q. You mentioned something about controversial, whether or not it was controversial. Is that one of the considerations that you gave as to whether or not an environmental impact statement is prepared?

A. That's one of the considerations, if there's contrary --

Q. If the project is contrary, you may prepare an environmental impact statement?

A. That's right.

Q. If it's not controversial material, even if it's after the affective date of NEPA you would still --

A. This again means those projects with the pipe line, any project for design that had not begun after February 1st, 1971, we need --

Q. This is under twenty-eight?

A. No, PPM90-1.

Q. I'm sorry. 90-1?

A. Any project after the first of February 1971 required an environmental statement, there is no question.

Q. Do you have any knowledge of the fact there might-- do you have -- let me rephrase that. Did you ever relate the fact or intimate to New York DOT that they might have or would prepare a statement for this project?

A. Not that I'm aware of.

Q. I'm referring specifically to Exhibit 31 attached to your statement and the last paragraph of Exhibit -- page 2 of Exhibit 31, you stated in that paragraph, you better initial by you, "You are aware the procedures of PPM90-1 have been recently challenged and there is a very good possibility the environmental impact statements may be required prior to PS&E approvals for all projects in the near future. We therefore, highly recommend that you make every

effort to abide by your tentative scheduling for including this project in your July, 1973 letting."

A. At that time, in that time period there was litigation around the country, they were aware of it at the time that the Federal Highway Administration was considering changes in the procedure memorandum under which we were operating. So, we were -- I was trying to continue moving the Federal highway probably --

Q. Isn't it true that you meant by this statement, you know, hurry up, get your PS&E statement so you don't have to prepare an environmental impact statement?

A. What I'm stating there, is I'm asking the State to okay the project before our procedures are changed.

Q. Well --

A. And, we would perhaps require an environmental impact statement.

Q. All right. Now, I'm a little confused. Look over on Exhibit number 2, I'm a bit confused because there are times it seems to me statements throughout these exhibits, I think this is one of them -- this isn't one of them, there seems to be some exhibits that say that the contract for the substructure and grading of approaches would not be a Federal aid

project?

A. Okay. The plan was that that project have a long life.

Q. I understand that.

A. And, the State Department of Transportation has a structure highway program of its own that it advances without Federal funds, and so for some projects they'll still decide they'll fund them with a hundred percent and not request Federal funding and this can change from time to time depending on their fiscal picture. So, I would assume that this at one time in the development of this project, the State had considered funding the project with one hundred percent State funds as they did Section 5-B, 5-A no Federal funds, but they do have changes of Federal funding of projects as they go along.

Q. Now, if you would look over on Exhibit 9, last page of the letter there, I notice that you have a projected cost of the bridge route as twenty-two million eight hundred nine thousand dollars and projected cost of the southerly route was twenty-eight million six hundred and fifteen thousand.

THE COURT: What is the exhibit number of this one?

MR. LIPPES: That is Roman numeral 9..

THE COURT: All right.

MR. LIPPES: Last page of the letter and also throughout a number of those exhibits you are saying that the costs of the projects were high and asking that we restudy. Well, the costs we got today are some thirty million dollars, was it your determination based on twenty-two million eight hundred nine thousand dollar figure or the current physical cost of thirty million?

THE WITNESS: That figure was estimated twenty-two million, it was an estimate, that's changing as you go along and we would get Federal monies at the time of approval of the plans and specifications and the estimate which in this case was May, 1973.

BY MR. LIPPES:

Q Even though you thought the costs were high, is that correct, the estimates were high?

A I'm sure we did. Originally I believe the actual low bid came in under, I believe we set up about

an eighteen million dollar total for this project and bids came in over fourteen million.

Q. Well, at least in Exhibit 10 you state, "The extremely high estimated costs of the crossing dictates that its economic feasibility be well established --" Is that correct? This wasn't a letter from you, this was a letter from Mr. Groves for J.A. Hanson, which you supplied as an exhibit to your statement. Were you always concerned about the cost and as I said before talking about three alternative choices --

A. We were concerned that we would get totally the most, the best consideration from all standpoints. I don't believe we picked the cheapest but we did at that time take into consideration the impact of the bridge and I believe the community of Bemus Point. We reviewed other locations that was probably more costly than the one at Bemus Point which crosses the lake at its shortest point.

Q. All right. Now, did you ever get any requests in your office from citizen groups concerning the environmental impact of the bridge on this project?

A. No, sir.

Q. You never got a request of this?

A. We searched our file, no indication where anyone had written into us.

Q. So, other than appearing in a public hearing you've never given any information out concerning this?

A. It's not required by the Federal Highway Administration to do this.

Q. I understand that. Now, looking over on Exhibit 18, Roman numeral 18, a letter dated June 8th, 1970, which you included in your exhibits, it states there that the, "The department does not anticipate using Federal aid highway funds on the approaches and substruction phases of this section of the Southern Tier Expressway." So, that date apparently this was one of the dates that they were not attempting to use Federal funds, is that correct?

A. Many times when these projects even though there were determinations not to use Federal funds.

Q. I'm speaking of at that point?

A. No, that is correct.

Q. As a point of that letter apparently there was not.

MR. O'CONNOR: If I could point out to the Court this is not Mr. Bestgen's letter, it's a letter from one State agency to another State

agency.

MR. LIPPES: But, it's included in his exhibit.

MR. O'CONNOR: Something from his file. It doesn't indicate what he felt.

BY MR. LIPPES:

Q. You received that letter on that date where it's marked received, is that correct?

A. No, that is the received date at the State clearing house.

Q. You don't know when you received that?

A. I don't know when it was received offhand.

Q. All right. Now, during this period of time wasn't the policy of your office to try to expedite as much as possible those, "Pipe line items"?

A. We were expediting all programs.

Q. Were you given any particular expeditious treatment to those items?

A. No.

Q. Were you given any particular expeditious treatment to those items that were considered in the pipe line?

A. You mean -- we have many, many projects in the pipe line, some more important than others, but to

expedite those projects just because there was approval pending, that was not the case, we just tried to advance the more important projects in the State of New York. We do that continually.

Q. It was not your intention then to try to hurry projects that might need future NEPA materials?

A. No, sir.

MR. LIPPES: I don't have any further questions.

MR. O'CONNOR: I have nothing further.

MR. DALES: Could I have just a moment, your Honor?

THE COURT: Sure.

MR. DALES: I have no questions, your Honor.

EXAMINATION BY THE COURT:

Q. Is it your contention, sir, that in view of the fact design approval had been given about sometime in 1970, there was no need for an environmental impact statement which was required by it?

A. Well, actually we were given approval in 1968 and that preceded the date set forth or set out in the policy and procedure memorandum. Design approval had been given prior to that time and there was no

requirement for an environmental impact statement under NEPA, no need for a statement under NEPA.

Q. Was there any time from 1968 when you were given design approval until November, 1973, when your organization could have stopped the building of this bridge?

A. Without subjecting ourselves to a lawsuit in the State of New York, I would have no basis for doing that.

MR. LIPPES: One further question, following up what you said, you would however, your office would have, prior to PS&E approval, denied Federal funding without opening yourself up to liability?

THE WITNESS: Yes, we can, I guess we can do that.

MR. LIPPES: In other words, you're not committed until PS&E approval?

THE WITNESS: Were not committed with funds until PS&E approval time.

MR. LIPPES: All right. Thank you.

BY THE COURT:

Q. If you'll bear with me just for a moment sir, I'm probably getting a little confused on some of the Federal terminology, which I'm not completely familiar with. I'm going to refer you to the file, Exhibit number 24, Roman numeral 24, Government's Exhibit F-1. Maybe it has nothing to do with your office and you can't answer it, but I believe, to Mr. Graham of the State Department of Transportation from Mr. Kirby division engineer, Albany, New York. Are you familiar with that letter, sir?

A. Yes, I am.

Q. All right. In that it indicates that this bridge proposal in list B and it's my understanding that as far as list B, consists, "Of those projects requiring a re-evaluation statement wherein design was approved before February 1st either on a new location or require right-of-way over fifty percent of its length."

A. That's correct.

Q. Now, I'm also going to refer you to a letter dated April 16th, 1973, from you to the Deputy of the State Department of Transportation, appendix I of Mr. Ketchum's affidavit Exhibit S-2 in evidence,

do you have that also?

A. I have that before me.

Q. Paragraph two indicates, "Since design approval was given prior to January 1st, 1970, there is actually no requirement in the current issue PPM90-1 for environmental impact statement or re-evaluation of this project." Now, is the word re-evaluation used in a different context than in each of those letters or am I confused?

A. This is a very confusing point, and it's confusing for this reason. When the National Policy Act was passed, the Federal Highway Administration on November, 1970 came out with a draft procedure for implementing that act. In that procedure it said if design approval had been given before February 1st, 1971 then you would have to re-evaluate that project to say whether or not it needed a full environmental impact statement.

MR. LIPPES: This was the Federal design engineer?

THE WITNESS: This would be the division engineer, yes. Then when that procedure for implementing the National Environmental Policy Act came out, that was form PPM90-1

Don Bestgen for State, By the Court.

in August of '73 -- '72, it included two dates with regard to this design approval, In other words, if design approval had occurred between January 1st, 1970 and before February 1st, 1971 only those projects had to be re-evaluated. So, we have two letters, one coming after PPM90-1 and one coming before the original draft instructions and what this in effect, when we had initial instructions of the November, '70 instructions, we looked at that, oh yes, you have to re-evaluate this project design, remember, not an impact statement, but a re-evaluation of the project. So you see they set up two dates and because we have been given approval in October of '68 there was really no need for environmental re-evaluation of the project. However, the State did do a re-evaluation, but it did not -- there was no environmental impact statement.

BY THE COURT:

Q. Let me ask you one other question, if today you or whoever is required to do so, to start making an environmental impact statement as relates to this bridge, how long would it take you to do it?

A. If the State gave it top priority probably could develop an environmental impact statement in six months. That would be a draft impact statement. That draft impact statement has to be circulated as to the number of Federal State agencies and has to go to the Federal Department of Transportation in Washington over to the President's council on environmental quality where they all go in all divisions and then it has to go to the Federal Department of Transportation in Washington and to the President's council of environmental quality for the appropriate division. I can advance this project, this procedure to take from a year to two years depending on how soon it is expedited and the degree of controversy surrounding it.

Q. Would you make use of past studies or anything that may have been done which would facilitate that final report?

A. Yes. I believe the State could put together a draft

report in six months or so, however it has to go through this review procedure. It's a formal review procedure and it has to be prepared and then has to go up to Washington to the council on environmental quality. And, all this takes a long period of time and many times they get tied up in Washington in the Secretary of Transportation's office so it could take -- it's pretty hard to judge, it could take a year to two years to get that report cleared in order to advance the project.

THE COURT: Do you have anything, Mr. Lippes?

MR. LIPPES: Yes, another question came to mind when you were asking him some questions.

RE-CROSS-EXAMINATION BY MR. LIPPES:

Q. Have environmental impact statements been prepared on other sections of this highway?

A. Yes, there's one under operation now for the westerly end and I believe the section through the Salamanca Indian Reservation, and there is a draft of an environmental impact statement that's just been submitted to us from the department. I don't

believe any other --

Q. Can you tell us why one is required on one section and not on the bridge?

A. Strictly based on advancement of the project.

Q. In other words, when certain approvals were given?

A. Yes.

THE COURT: He said most westerly. That is 5-A, approval was given on that?

THE WITNESS: That was accomplished with one hundred percent State funds. We have not been involved in that but I believe the State could best answer that. They just decided to go ahead and prepare an environmental impact statement to avoid, I would suspect getting into this situation.

THE COURT: Do I understand 5-A has everything done but the paving?

THE WITNESS: That's right. That was done with a hundred percent State money, we weren't involved in this.

BY MR. LIPPES:

Q. Other sections than you say were given approval after the date and required an environmental impact

statement?

A. Only one section I know of and that is the one for the Allegany Indian Reservation. That is under negotiations because of the problems with the Seneca Indian Nation in acquiring Indian land.

Q. Any other sections where an environmental impact statement was required on the Southern Tier Expressway?

A. I think on the easterly end there is a section through Corning that's in the preliminary stages?

Q. That hasn't been completed yet, the Corning, I thought the road --

A. It has not been.

Q. And, that's the only section?

A. The only one I can recall offhand.

MR. LIPPES: Okay. Thank you.

THE COURT: Mr. Dales, do you have anything?

MR. DALES: I don't.

THE COURT: Mr. O'Connor?

RE-DIRECT EXAMINATION BY MR. O'CONNOR:

Q. In response to Mr. Lippes' question you said that

this 5-A segment is apparently having an environmental impact statement prepared, do you say that also the section running through the Indian Reservation requires one or are you referring to that as one unit?

A. No, there would be an environmental impact statement being prepared on the segment of the Southern Tier Expressway through the Allegany Reservation.

Q. I see. There is perhaps three segments then that there's an environmental impact statement being involved in some degree, is that right?

A. In the whole length of the Southern Tier, yes.

MR. O'CONNOR: I have nothing further.

DIRECT EXAMINATION BY MR. DALES:

Q. To set the record straight, I know Mr. Bestgen is saying that there's no impact statement being prepared for section A, it's section B, that's the one, it's not A. It's done with a hundred percent State funds. It's open, it's a snowmobile track now, I guess, they just have to put pavement on before the road. Now, section B if you recall, B is the part that we have gone ahead with the right-of-way acquisition

and the rough clearing but I don't think we've got anybody -- we knocked some buildings down in connection with our acquisition, but we have not progressed that to the construction stage.

THE COURT: All right. In other words, there has been no design approval for that?

MR. DALES: That's my understanding, no design approval for that stretch.

THE COURT: For that section, all right. Anything further of this witness? Thank you, sir. You're excused. Either Government have anything else?

MR. DALES: I don't, your Honor.

MR. O'CONNOR: No further witnesses, your Honor.

THE COURT: Mr. Lippes?

MR. LIPPES: Could I take a five minute recess?

THE COURT: All right. How many witnesses?

MR. LIPPES: I think two, one very short and one a little bit longer.

THE COURT: All right. Fine. We'll recess for ten minutes.

(Whereupon, a short recess was then taken.

THE COURT: You ready, Mr. Lippes?

MR. LIPPES: Yes. The Plaintiff's call Royal Steubing.

R O Y A L S T E U B I N G, after being duly called and sworn, testified as follows:

DIRECT EXAMINATION BY MR. LIPPES:

Q. Mr. Steubing, are you the same Royal Steubing who is a named Plaintiff in this action?

A. I'm afraid so.

Q. Are you a member of any organization that is also a named Plaintiff in this action?

A. Yes.

Q. What organization is that?

A. Chautauqua County Environmental Defense Council.

Q. Do you hold any position in that organization?

A. I'm presently vice-president.

Q. Vice-president?

A. Yes.

Q. Now, Mr. Steubing, you're familiar I take it with the proposed bridge over Lake Chautauqua?

A. Yes, sir.

Q. And, have you in the past been familiar with the

planning of this?

A. Planning, yes, sir.

Q. Did there come a time when -- can you tell the Court at what time you knew that the bridge was going to be built?

A. I still don't know whether it's going to be built.

Q. Did there come a time when you felt that there was reason to believe this bridge was going to be built?

A. When the contract was issued.

Q. And, do you know approximately what date that was?

A. Last summer.

Q. All right. Now, over this period of time you have been active in trying to foster an alternative of the bridge itself?

A. Yes, sir.

Q. What type of things have you done during this period of time to get an alternative established?

A. Now, you want the whole list of things?

Q. Yes, generally?

A. Well, this is like a history type of thing.

THE COURT: Give us an historical analysis if you wish?

THE WITNESS: Basically we started an Environmental

Defense Council, it didn't take ahold and I re-organized and re-vitalized it and somewhere around 1970, this is about the time. One of the first things that came to us was the Sportsmen, they come with the idea that we could help them with the bridge. All right. Then many people were coming in and asking about what we could do about the bridge, so I said we've got to find out the facts and figures and so forth. There was all kinds of work going on. All right. And, I think one of the first things we did was to go to the County Planner's office, Mr. Luensman who was here this morning, two or three of us, at least two other individuals that I can remember and this was the first that we had ever seen of any plans of the bridge. And, I was dismayed.

BY MR. LIPPES:

Q. Let me just ask you, were you in the Jamestown area in 1965?

A. No, sir.

Mr. Steubing, let me, rather than going on, let me ask you a few questions. Did you -- did there come a time when you had knowledge -- let me rephrase that, did you ever ask any members of the New York State Department of Transportation or Federal Highway Administration whether or not there were any problems with the bridge in terms of compliance with the law? Let me see -- I think it was March of '72, I'm not sure, my figures are not as complete as DOT's but I do know that -- I don't know if I have them in sequence or not. I know we asked the DOT people to have environmental meetings and at that time I was in the middle, I was trying to be a moderator, act as a mediator to try to get the facts just as to the status of the bridge. I took a tape of that meeting and it could be submitted as evidence if those are legal. I called the DOT and at the meeting they sent representatives and there was a group of concerned citizens and it's got on there some of the things that just come up, you know, on the status of the bridge and the cost and something about an environmental impact statement, and what steps to prohibit ecological damage. That basically is some

of the questions that we started out with.

Q. At that meeting when you asked whether or not an environmental impact statement had been prepared, what answer did you receive?

MR. O'CONNOR: Well, your Honor, if there is a tape of this conversation I would think that perhaps that would be the best method of showing --

THE COURT: Would you be interested in putting the tape in evidence?

MR. LIPPES: If there is no objection from the State or Federal government we would be glad to enter the tape in evidence.

MR. O'CONNOR: I would think that with all due respect to Mr. Steubing, that he might remember most of what was said, still it's second-hand and it's his interpretation.

THE COURT: Without having listened to it, do you still want to put it in evidence?

MR. DALES: I think I would rather hear it first.

MR. O'CONNOR: I want to hear it first, obviously.

THE WITNESS: Would you bear with me, these answers that I have on this sheet are from the

tape.

THE COURT: I assume, Mr. Steubing, you've listened to the tape and made some notes?

THE WITNESS: Several times.

THE COURT: As a result of your listening to the tape, you're testifying based upon those notes, is that right?

THE WITNESS: That's right.

THE COURT: And, if at some later time the Government wants to listen to the tape --

MR. LIPPES: It is available.

MR. DALES: For my edification, I don't think we had a time frame fixed here and it's a little confusing for me.

MR. LIPPES: Approximately March of 1972, Mr. Steubing I think, he wasn't sure when he asked for the meeting, but I believe the meeting was in March of '72, is that right, Mr. Steubing?

THE WITNESS: Right, sir.

THE COURT: Okay.

THE WITNESS: During the meeting of March 22nd, I asked additional information, March 22nd, 1972

was the date of the meeting.

BY MR. LIPPES:

Q. All right.

A. I think Mr. Mueller was there and Mr. Pecknec.

Q. Mueller and Pecknec from the DOT --

A. Yes.

Q. -- New York State?

A. Yes.

Q. Would you go on and answer the question, the specific question about the environmental impact statement concern?

A. The DOT answer to that question was a number of cut-off dates have to follow -- on this project, a number of cutoff dates have to follow this project and they were required to have an environmental re-evaluation prepared.

Q. They told you they were preparing --

A. It had been prepared and I assume it had been accepted.

Q. So, did you have, through your conversations and actions concerning the bridge, did you ever feel that you had reason to believe that laws were not being complied with?

A. No, sir.

Q. All right. Now, Mr. Steubing, why didn't you attempt to bring a lawsuit prior to the time when a lawsuit was actually brought?

A. Again, the very next thing I have down here, is I got -- I asked is our recourse then to getting to the Legislature? And, DOT answered right. I understood -- and, as I understood it, you needed a special bill, they said that we needed a special bill in the Legislature to change the highway law. You can't design anything that strays from that stipulation, that was DOT.

Q. So that it was your impression DOT was telling you the only way you could get an alternative route at the time of the meeting, March of '72 was by going to the Legislature?

A. That's true.

Q. At this time then, did you feel that was the only recourse?

A. That's true.

Q. All right. Is there anything else you would like to add, Mr. Steubing?

A. Well, in response to that, we thought that was our only recourse and in the process of so doing we

believed in the system. So that we went to the people and the ad which has been submitted in evidence was one of the things we did, the collection of petitions, going to the Legislature, the fact that after we had done those things and we were not heard, the Sportsmen still felt the only way we could do it was to get the law changed and the New York group of Sportsmen Federation did secure a bill or amendment, a highway transportation bill in Albany and of course during this time we wanted out local Legislature and assemblymen in particular to present the bill, but during this time our local, county Legislature went on record as being in favor of the highway which included the bridge which strapped, I guess, his hands. Now, the point here is that we still felt we had to get this through and we did have a man from outside of our county present the bill, I'm not sure, I think in the Rules Committee or something like that, so that the bill is there and -- but never got out of committee, as far as I know.

Q. Was there any other -- were there any other conversations or any other time when you felt that you were being mislead as to building of the construction data

of this bridge or anything of that sort?

A. I don't know whether you call it being mislead or not but I know that in one of our meetings I think the meeting at which Mr. Ketchum was at, this was the meeting that Assembly Beckman called.

Q. Approximately what date was that, do you remember?

A. I'm not -- I can't --

Q. Do you have an estimate of the date, the year, maybe?

A. Before the Transportation Bond Issue, the one on --

Q. '72 or '73?

A. Was it '72, I think.

Q. All right.

A. The first one?

Q. Yes.

A. And, during the course of that meeting it was brought up what happens if the Transportation Bond Issue fails and I cannot say conclusively but anyway I gathered from the response that we weren't to worry about the bridge for a while.

Q. In other words, if the Transportation Bond Issue failed, the impression you got from the DOT representatives was that the bridge might not be built or it might not be built for a long time, is that right?

A. That's right.

MR. LIPPES: Okay. Thank you, I have no further questions.

THE COURT: Mr. Dales?

MR. DALES: I have no questions of this witness.

THE COURT: Mr. O'Connor?

CROSS-EXAMINATION BY MR. O'CONNOR:

Q. Well now, Mr. Steubing, you say that at this meeting in March of 1972 you went in and asked the representatives of the DOT about an environmental impact statement, is that right?

A. That's right.

Q. Did you use those words?

A. I think at that time we were using environmental impact statement, now I think we used the term environmental impact statement, sir.

Q. Where had you heard that term before?

A. Well, being involved in environmental issues, somewhere along the line I'm sure I've come across it, I couldn't tell you where I heard it before.

Q. Had you talked to an attorney at all?

A. No sir.

Q. Had you read the statutes to the National Environmental Policy Act or any of those statutues to find out about this term of ours?

A. No.

Q. Had you been in contact with people in the public interest type organizations, Environm tal Defense Council or this type of thing, you think that is where you may have heard the term?

A. I -- are you familiar with the environmental lobby that came out of Albany, I went to one of their first meetings when Davey presided and I'm sure I heard it there.

Q. This is the term -- you're referring to now that you heard the term at this meeting?

A. Yes, that is the term.

Q. And so, in other words you had been at a meeting before with an environmental group and you knew that there was a document called an environmental impact statement?

A. That's right, sir.

Q. And, you asked those people from the DOT if they prepared an environmental impact statement, is that

right?

A. I don't know whether I said those exact words.

Q. Well, did you ask them if they completed one?

A. The question come about as far as the environmental impact, now I don't know what term it was or how the question was asked.

Q. Well, you said, you said that expression and you asked them something about it, now, what did you ask them?

A. I asked them basically what I got is just -- I got a note environmental impact concern and DOT, their answer was the number of cutoff dates have to follow this project required -- but this project required an environmental re-evaluation.

Q. Well, in other words, what they told you is substantially what you heard here in the Courtroom during the last couple of days, isn't that correct?

A. That's true.

Q. That it was their view it was not necessary to file an environmental impact statement?

A. That's true.

Q. But that they did file something else which they called an environmental re-evaluation?

A. Yes, sir.

Q. So at that point, you knew in 1972, March, the same thing that you know now from what you heard in the Courtroom, is that right?

A. That's true.

MR. O'CONNOR: I have nothing further.

MR. LIPPES: Nothing further.

THE COURT: Mr. Dales?

MR. DALES: Nothing, your Honor.

THE COURT: Thank you, Mr. Steubing, you're excused.

MR. LIPPES: Plaintiff's call Mr. Billquist.

E R N E S T B I L L Q U I S T, after being duly called and sworn, testified as follows:

DIRECT EXAMINATION BY MR. LIPPES:

Q. Mr. Billquist, are you familiar with the Lake Chautauqua Bridge?

A. Very much.

Q And, have you been active in attempting to propose an alternative to that bridge?

A. Yes.

Q. And, are you a member of any organizations that would be active in that?

A. Yes.

Q. What organization is that?

A. Chautauqua County Federation of Sportsmen Council to start with and the New York State Conservation Council.

Q. Now, particularly with reference to the Conservation Council because I understand that the Conservation Council had sponsored some legislation?

A. Yes.

Q. And, can you explain to the Court the nature of that legislation?

A. May I give a small explanation of the structure of the council for informational purposes?

THE COURT: You can if Mr. Lippes wants you to.

BY MR. LIPPES:

Q. Briefly.

A. Well, I just, so they'll know what it is, the New York State Conservation Council is composed of sixty County Federation of Sportsmen clubs and conservation clubs and they, at our annual convention they act upon county resolutions in matters that counties feel

they have a problem. And, in response to that the federation submitted a response to the resolution submitted by the Chautauqua Federation of Sportsmen Club to the New York State Conservation Council, they adopted a resolution opposing the construction of this bridge on the grounds that there was no assurance that there would not be an environmental or ecological damage and to further that event after this was, this resolution was adopted, they had their attorneys draft an amendment to the Transportation Law to prohibit the placing of a bridge or any kind of structure across Chautauqua Lake.

Q. Do you know when that resolution was submitted to the Legislature?

A. Submitted to -- the first opportunity when the Legislature convened in 1973. The resolution was adopted in September at our annual convention at Niagara Falls in 1972 and was prepared and submitted at the earliest possible time as soon as the 1973 Legislature convened.

Q. I see. Now, do you know what happened to that first Legislation?

A. It -- we could not get either of our local assemblymen

or State senators to sponsor this Legislation so we submitted it in Albany, and it was introduced by our lawyers.

Q. Was that Senator Sears?

A. No, our lawyers had introduced it to the Legislature and the Assembly Rules Committee. It was subsequently locked up in committee and is presently among the pre-file bills to be considered in the 1974 Legislature.

Q. I see. Now, did you also attend any meetings with members of the Department of Transportation?

A. No.

Q. You never attended any meetings with DOT, is that right?

A. That's right.

Q. And, you have had no discussions with DOT at all?

A. No.

MR. LIPPES: All right. I have no further questions, thank you.

THE COURT: Mr. Dales?

CROSS-EXAMINATION BY MR. DALES:

Q. One question, I think Mr. Billquist, you stated that the New York State Conservation Council pursuant to resolution had their attorneys draft a bill for the Legislature?

A. Right.

Q. Did they draft this with knowledge of the facts as they have been determined here in the last two days that there was no environmental impact statement and that there was a re-evaluation statement which complied with the law?

A. I have no idea what the attorneys have had more than the fact they complied with the request contained in the resolution.

Q. All right. But, it was drawn to the attention of your attorneys, who were your attorneys?

A. Alan and Alan from Baldwi , New York.

Q. This was sometime in you say October of '72?

A. Immediately following the convention our Sportsmen Club had asked to submit the resolution at the earliest possible time and our convention was in 1972.

Q. Do you know whether that proposal was pre-filed in December?

A. To the best of my knowledge, I was told all bills that had been in committee when the Legislature adjourned would be pre-filed for 1974.

Q. Perhaps you misunderstood me but you had this Legislation drawn in the fall of 1972, is that correct?

A. Presented at January, 1973.

Q. Now, for the 1973 Legislature, is that it?

A. Right.

Q. Was it pre-filed then in December, 1972 for the '73 Legislature?

A. No, after, presented after the Legislature had gone into session.

Q. Sometime after the first of January?

A. Sometime shortly after the first of January, sir.

MR. DALES: Okay. I have nothing further.

THE COURT: Mr. O'Connor?

MR. O'CONNOR: I have nothing, your Honor.

EXAMINATION BY THE COURT:

Q. Mr. Billquist, how long have you resided in the Chautauqua County area?

A. Well, almost all my life, sixty some years.

Q. Any recollection of the meeting in November of 1965 relative to this bridge?

A. No, I don't have any recollection of it, no.

Q. Do you have any recollection of any publicity or any activity relative to this Southern Tier Expressway between 1965 and 1970?

A. Nothing more than occasional rumors that kept flying around, nothing concrete or of any factual information.

Q. Where do you live, sir?

A. In Jamestown.

Q. Have you lived there most of your life?

A. Most of my life, yes sir.

MR. DALES: One question, do you read the newspapers, Mr. Billquist?

THE WITNESS: Yes.

MR. DALES: Okay. No further questions.

THE COURT: Mr. Lippes?

MR. LIPPES: No, nothing further.

THE COURT: Mr. O'Connor?

MR. O'CONNOR: Nothing, your Honor.

THE COURT: Thank you, Mr. Billquist, you're excused.

MR. LIPPES: We have no further witnesses.

THE COURT: Does the Government have any further witnesses?

MR. DALES: No, your Honor.

MR. O'CONNOR: No, your Honor.

THE COURT: If you want to make oral argument, Mr. Lippes, I'd be very pleased to hear it. I don't know if Mr. Dales or Mr. O'Connor is prepared to make oral argument or make rebuttal at this point, but if they want to they have that right and if they don't want to they can put it in writing or come back Monday.

MR. DALES: I think, your Honor, if it's agreeable I would think it would be more appropriate from my standpoint to include this type of argument in our brief, conclusions of law.

THE COURT: You could do that, I'm not going to preclude any of you from making any oral argument if you want to at this particular time.

MR. LIPPES: I would like to make some oral statement

for the record.

THE COURT: Go ahead.

MR. LIPPES: First of all, your Honor, I understand you have a memorandum of law so I'll try not to go into any great detail in covering those materials so that it won't take up a terribly long period of time, but there are a few points I would like to make, a few things that I discovered in my research. The first thing I would like to point out is dealing with the issue of whether or not we're dealing with the Southern Tier Expressway or we're dealing with the Lake Chautauqua Bridge, Section 5-C. It is our contention that the only thing in issue in this case is Section 5-C, the Lake Chautauqua Bridge, and that the Southern Tier Expressway, to what extent it has been completed, is not in issue in this case at all. And to support that position we would state the case of Monroe County Conversation Council versus Volpe which case is cited

in I think my first memorandum of law. Well, that case did not raise the issue of Laches and we're not using that case for that issue, we feel it's relevant in that case the State dealt with approximately a twenty-three mile long highway loop around Rochester of which sixteen miles were completed. In that case the Secretary of Transportation was relying on the fact that they thought no environmental impact statement was necessary.

THE COURT: If I recall in that statement, there's been no final PS&E approval at the time the action was commenced?

MR. LIPPES: That's correct. The Court's finding in conclusion of the case was that PS&E approval was after January 1st, 1970. The fifth day of NEPA environmental impact statement must be prepared and also that expanded hearing --

THE COURT: Let me just ask you would it seem indicated based upon that that the

action would not have been premature or was not premature even though it was tried or commenced prior to the final PS&E approval? That is one of the questions in my mind, when was it premature to have been filed when we're getting into the question of Laches?

MR. LIPPES: It's difficult to say whether the action is premature. I personally think the action, you could look at certain dates, one date being whether the law was affirmative, our contention is that the proper time in which to bring the action was the date, the proper minimum time to bring the action was when PS&E approval was given. The reason I say this is because many Courts have stated in dealing with the issue of Laches that individual citizens have not the right to rely on public officials following their functions and until the time PS&E approval was given the Federal government could have requested anything that had

been done, the point of where PS&E approval were completed and at that time we feel the lawsuit ripened. That does not mean to say the Courts have found a ripe issue prior to giving PS&E approval.

THE COURT: You're saying in the Monroe County case it would indicate the lawsuit could have been commenced prior to final PS&E approval?

MR. LIPPES: I think that's true.

THE COURT: And, not be considered premature?

MR. LIPPES: Yes, I think that lawsuit could be brought before you, I think the last ripe date minimum would have been when PS&E approval was given.

THE COURT: All right.

MR. LIPPES: In this case the secretary tried to bring in the fact that the entire twenty-three mile segment was -- should be considered and the sixteen mile completed section should be considered and the State dealt only with the four point five mile section here and that's the only

thing in front of me that I will consider. Now, I think also Monroe County and a number of other cases both this circuit and other circuits are relevant to this case, even if they had not raised the issue of Laches like Monroe County had, not because in the early litigation involving '70, '71, even '72 Litigation we could say -- we can't demand instant compliance with the law, as the Court said in Green County in the second circuit. And, we could say perhaps we were working with those laws trying to find out what exactly the duties of the Federal, State governments are. But in this case it's clear what the duties are as I stated in my memorandum both in terms of 4-F, State and Supreme Court and in terms of design, an environmental impact statement in the second circuit, it's clear PS&E approval was given after NEPA and they must comply, they must prepare those statements. Now, it's been some three and

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a half years or a little longer since we filed our lawsuit. PS&E approval was given, it would be -- was given almost a year since the occasion when Monroe County had passed, still there was no compliance and even today, the testimony we have heard follows the same kind of reasoning that was litigated in Monroe County. An environmental impact statement does have to be prepared because this was the highway that was designed for approval prior to the time of NEPA and it was in the pipe line and the Court completely said that is not a proper standard in the second circuit, but we still do that even today. And, we're dealing here with the issue of Laches, equitable issue into that which has to be thrown with the State's equity and with the Federal government equity is and where do they stand on equity at this time. And, we feel that they don't stand up very well considering it was clear if they don't know they

should have known what the dates were and they absolutely disregarded them. Now, the Supreme Court has not formally reached the issue of Laches, the Overton Park case which is Section 4-F case, the Supreme Court did in fact enjoin -- issue an injunction of a highway going through the park where two point million dollars had been spent -- right-of-way had been acquired. That case has been submitted both on -- the Overton Parkway case it stands for the fact they were dealing with Laches -- would not, should not apply. And, in Harburg versus Volpe, a middle district Pennsylvania case in 1971 they found the Overton Park case to be controlled and also -- well no, there was another, it was two cases, they found the Supreme Court had spoken on the issue of Laches although -- but not using those terms. Now, we have in our memorandum a number of cases that we feel are similar to the case in issue

here. In the vast majority of cases when the Courts have dealt with environmental litigation and found that the law has not been complied with, especially dealing with NEPA, the Courts have issued injunctions and they speak on the issue of Laches, they deny it, Laches were not the issue. If not they issued an injunction. This is all the way from the most extreme case that I can think of which is the Environmental Defense versus TVA even though over a hundred million dollars had already been spent. It was a dam project. Most of the things, the project was already completed including a bridge, including miles of highway and the Court said basically Laches doesn't apply and I'll give you why they found that way in a minute. That injunction should issue and this was inspite of the fact the District Court in that case in finding that the project was dry docked through an injunction, fifty million dollar cost

to the State, fifty million dollars more if they proceeded with the project, that's I think a sixth circuit case. In the Arlington Park case the Courts dealt, that was a fourth circuit Court case, the Courts dealt with some of the same issues that were heard in the Court in the past few days. And, in that case the Court listed that certain percentage of right-of-way had been taken, certain percentage of acquisition costs had been made, certain percentage of demolition had been made and in this case we had the same kind of testimony although the right-of-way acquisition was taken. Again the Court stated that an injunction should issue. Now, I would like to go into briefly, to those cases that briefly, what we actually feel the second circuit really is. Now, again the second circuit has not directly reached the issue of Laches, so-called Laches, they haven't said anything about it. We do have

hints of that and the most extreme hint we get is from a three Judge Court and decision whereby Judge Friendly, where Judge Friendly stated -- I'll paraphrase it in so many words, the tardiness of the Plaintiffs in bringing a lawsuit does not excuse the Defendant from compliance with the law. Now, that case has been cited numerous times. That case has cited as recently as 19 -- this year in the first circuit. In Jones versus Lynn, 477 Federal second 885, I don't think I have that citation in my brief, and they stated exact language in that decision as controlling that case. Now, that I think brings us to what the feeling is in the second circuit. Now, in the Green County case which I also cite in my brief, the Court declared in that case to issue an injunction on two lines dealing with the Federal Power Commission and the Federal Power Project were two of those projects were eighty

percent complete but in that case which is cited by the Federal Defense they said the reason they did this was because the Section 313-B of the Federal Power Act mandates that the Judge review laws be sought within sixty days. They also went on to say that I think, I would like to quote this line -- I can't find the citation, in any event they went on to say in Green County that they could be shown within compliance of the Federal laws that -- here, I found it, they say that even with this compliance, and although we may arrive at a different conclusion, if there was significant potential for subversion of substantive policies expressed in NEPA -- and they go on to say that there's no indication as there is with respect to the Gill Boa guidelines in which they did grant an injunction of obstinate refusal to comply with NEPA. I think in our case we can show an obstinate refusal to

comply with NEPA. We can show that the State and Federal government in this case is attempting to side-step NEPA and attempting to not comply with, they can get away with it because as opposed to Green County, our case, we have a clear relation they didn't have prior to this point. And, we have the kind of language that was testified to in Exhibit 31 of the Federal Government's first exhibit where it stated if you were aware of the procedures of PPM91 recently changed, there's a very good possibility of an environmental impact statement may be required prior to PS&E approval in the near future. We therefore highly recommend that you make every effort to abide by your tentative scheduling, it's clear on the face of it, the meaning of it, they're saying that there may be a change and if you don't comply with NEPA you better get in under the gun.

THE COURT: Do you feel that if there were not a

deliberate effort to bypass NEPA that Laches might qualify?

MR. LIPPES: No, I don't think that, in the second circuit I'm showing a number of other considerations that the Courts -- how the Courts have handled it. I think that's the consideration we have in this case. I believe it was the opinion in Monroe County, the Judge stated that he concurred because there was compliance of the law but he felt it was the people in the City of Rochester had waited a long time for their highway and he felt after an environmental impact statement was issued it would probably be held up for four or five years, but he said he concurred with the Court because it appeared that the Department of Transportation looked down on the environmental groups, and he felt that -- he felt that something had to be done. Even after Monroe, even after this language it appears that we're still getting the exact same issues

litigated over again, coming into the Courtroom and the Federal government is saying the same thing, we don't have to comply. Of course this time they're using Laches. Now, there's a number of other decisions cited in my memorandum as to the stand for the proper position, both Laches doesn't apply and the Courts have given their reason basically as two fold. One that the overriding consideration in NEPA case complied with the law, this overrided any prejudice that may allude to the State. Two, that the Plaintiffs in the case are fulfilling public interest, felt they're not in Court to litigate for any private interest but they're litigating the interest of the public as a whole. I have cited the language as to support for both these propositions the language in the second curcuit case, a number of years ago saying the agency involved cannot just sit calmly and act as an umpire, they must

affirmatively perform fully their duties and if the Court read any of the cases, the thing that comes through very strong and clearly is the strong, very strong language of -- that the Courts used in every one of these cases. Even the one case I could find which seems to treat Laches in the completed traditional sense did not seem to throw into the pot all those considerations and did in fact invoke Laches, that is the case of Clark versus Volpe cited by the Defendants in their brief.

THE COURT: Other than the fact that was a different circuit and might come up with a different ruling, are you interested in distinquishing that for me?

MR. LIPPES: I would like to point out, the first thing, the Court invoked Laches reluctantly, his phrase, I will point out in that case that Laches, much of the work that was done in pre NEPA, in this case as opposed to this case were a good number, good

amount of work that was actually done was -- was that it was done after NEPA other than the planning and specs. I point out that twenty-five to thirty percent of the work, I'm talking about men, I don't think we're talking about work that's already completed, more than we have in our case and also the fact that since Clark it is -- which was one of the earlier cases in that circuit, the rules again have been qualified, the Federal and State governments have been told what their duties are and I question whether or not that if that same case came up in Court this year that the Court with past precedence that have come down if they would still find that Laches should be invoked. And, Elco versus Volpe also cited by the Defendants in this case, again, much more was done environmentally in that case and that case dealt with the F-4 case highway, and statement was presented, thirty-four

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State and Federal agencies had seen this material that had been circulated among those agencies. More of the highway was completed and much of the work was again prior to NEPA, but I think that case is somewhat again distinguishable and the Court in this case said -- did in fact enjoin parts of that highway with some of the right-of-way that had been acquired. Laches again -- that is not a case where Laches was raised. So, where only a few of the right-of-way acquired, the Court said the terrain was still unmolested. They did enjoin the work in that case. Now, I think this Court, if this Court decides that Laches does apply in some sense, that Court may consider that it's not the issue because of what the prior decisions have said and if the Court applies, if in fact that case to the fact in similar cases I think in the vast majority of similar cases, I think the Court, if it followed

precedence would be left with only one decision, that Laches could not apply in this case under the facts presented. Now, the reason for this, I think I raised a number of points, first of all it's our contention that any bridge difficulties that allure to the State, first of all could not be considered after November 23rd, '73, after they had notice of our lawsuit. So, any work that was done was done in the face of possible injunction. Now, we also contend that the work done prior to PS&E approval would not be -- should not be considered as prejudical because again, we have the right to rely on public officials doing their duty. And, in fact testimony has been given that it's the feeling of the Plaintiffs in this lawsuit that all laws were complied with, this is what has been testified in Court today, this is what they have been telling the Plaintiffs all along. Also, it was not until the PS&E approval

on the contract letting that the Plaintiffs really knew and at least one case based on denial of Laches, I believe four circuit, I don't remember the name right now, based a denial of Laches on finding that they could not state to the Plaintiffs knowingly, in italics, did not knowingly sit on their rights, they could not make that determination.

THE COURT: In this particular case I believe there is evidence that a bill was attempted to be submitted into the Legislature?

MR. LIPPES: That's right.

THE COURT: At least three or four months prior to PS&E approval, which bill as I understand if passed, if passed will prevent the bridge from going up?

MR. LIPPES: That's correct, that is another part of the limitations that we're stating here. That the Plaintiffs feeling was that they had one way to go in this case and that was to try to work through the Legislature to get an alternate route in

effect, and they in effect did that, they talked to the local Legislatures and they petitioned and they put an ad in the newspaper. We have been admitting all along that we knew of the plan for the bridge and we would be fools not to. We went to the meetings. We didn't know that the bridge was going to be built, we didn't know about the implementation and I think that is an important consideration here. So that the Plaintiffs felt that this was the only way to go, they in fact did this and until the point where they could see one, that the bridge was going up, was going to be constructed and two, that any bill they put into the Legislature if passed would not be passed soon enough to solve any degradation of the lake. Only at that point, should they -- if they had waited would Laches apply because at that point they shouldn't be held to knowledge.

THE COURT: I haven't reviewed any of the newspaper

clippings which were part of one of the exhibits presented by the State, do you know offhand if any of those newspaper clippings publicly gave any indication that the bridge was in fact going up? Whether or not there is a basis for it?

MR. LIPPES: I haven't read all the clippings, I know that the advertising for bids was advertised in the paper.

THE COURT: All right.

MR. LIPPES: I know there's been much publicity on the planning of the bridge itself and I think it's correct that when a member of the Department of State stated it was always assumed that the bridge would be built, assumed apparently by everyone but the environmental groups that were trying to fight it. They were fighting the alignment up against the entire, the whole area frankly and it was always assumed it was going to be built but not assumed by our environmentalists. I don't think they can be held to that

assumption until it was clear to them that the bridge should be built or was going to be built. Now again, going back to the old cases, Brooks versus Volpe, this was a Supreme Court case that I mentioned where two point two hundred and six million was spent. Brooks versus Volpe, in the eighth circuit all right-of-way was acquired and construction had been done as in our case, upheld injunction. Scherr versus Volpe in the seventh circuit upheld injunction even though construction projects were -- exceeded a million dollars and actual construction had been commenced. Environmental Defense Fund versus TVA, sixth circuit, twenty-nine million dollars had been expended, a steel span had been completed and steel bridge had been completed. Five miles of new roads and thirty miles of re-located roads had been acquired and construction had begun on all major or components of the project

except for navigation canal and the project was enjoined. Even though the District Court held that it would cost five million to halt construction, it was denied, the Court denied the defense of Laches accepting every argument I made to this Court as the reason and issued an injunction. Arlington Coalition versus Volpe, fourth circuit case, ninety-three point nine of all dwellings had been acquired, ninety-eight point five percent of all businesses had been re-located, eighty-four point six of all homes had been re-located, seventy-four point four percent of all right-of-way had been acquired, at an acquisition cost of twenty million four hundred seven thousand some dollars an injunction was issued. The Court finding and stating the rule that the Court must look to the critical stage, the stage at which the environment had been unalterably changed and in this case they felt the environment

had not yet been unalterably changed even though there had been the tearing down of all those buildings and all those structures and specifically we feel that the environment that we're dealing with, the lake, had not been unalterably changed, in fact the only thing done has been some minor dredging and one pile has gone in, this is not unalterably changed, and if perhaps construction goes on it will be and there will be a time when the Lake will be unalterably changed, but at this point it is not, and when we filed the lawsuit the construction contract was only something like three percent or less complete. Now, to go on, in the first circuit the Conservation Society versus Texas issued an injunction when two end segments leading up to a park were completed and the right-of-way in the park had all been acquired, and in the circuit Court again in 1971 one case D.C. Federation versus Volpe halted

work in progress on the Three Sisters Bridge, the District Court of Maryland, Laches was denied and issued an injunction, even though sixteen million four hundred thousand dollars had been expended and all right-of-way had been acquired. And, in the Western District Beirs versus Volpe fourteen million dollar under contract and construction started, the proceeding had gone through forest restoration and grading and seven major structures were under way and a substantial percentage of the work was completed, an injunction was granted.

THE COURT: Are these cases cited in your brief which you previously submitted?

MR. LIPPES: I'm going through them now. I won't go through any more than I have already. The ones I said were only those cases where right-of-way was taken and construction started, there are many other cases dealing with equity involved, I could mention stoppage three cases, there

is one case which is four PR 31906 which deals with the issue of equity involved although construction had not started in that case, and injunction issued.

THE COURT: It did issue?

MR. LIPPES: Yes.

THE COURT: Thank you. Mr. Dales, Mr. O'Connor, if you want to say anything as I indicated, if you want to say anything orally fine, if you don't want to say it and you want to present it in a brief, feel free to do so. I would be interested in course of a distinction of the Monroe County case which does seem to indicate to me that the Court in this particular case only took into consideration a small segment of the expressway in that case.

MR. O'CONNOR: I want to point out although I don't want to launch on to a long oral argument, I think the distinction is pretty simple, I think that in that case nothing had been done on that segment. Now, if something had been done enough to envoke

perhaps Laches, then if you're going to consider equitable considerations, you have to look at the whole picture. I don't see how you can close your eyes to twenty-eight miles of highway, but twenty-eight miles of highway alone won't be a reason for Laches. If you yourself -- State agency has satisfied this is a separate segment, the rest is open to traffic, I think --

MR. DALES: I think also, Judge, that you have to look at the structure, in Monroe County they hadn't acquired the right-of-way yet which preceded PS&E approval.

THE COURT: All right. As I say, if you want to submit briefs to me, I'd be very happy to accept them, submission of briefs and submission of proposed findings and facts and conclusions of law. I don't want to unduly pressure people, but I certainly- you're all aware of the fact that it is of critical importance to all of you as well as to the Court. The reporter's office

will inform me when the transcript has been delivered and you will have ten days from then to submit your briefs and submissions of proposed findings and facts and conclusions of law. Anything else on the record you want to put in? All right.

* * *

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.: **Royal Steubing, et al. v. Dept. of Transportation**
CITY OF ALBANY)

Christy Plumadore, being duly sworn, says:

I am over eighteen years of age and a **Stenographer** in the office of the Attorney General of the State of New York, attorney for the **Appellant** herein.

On the **7th** day of **August** 197**4** I served the annexed **Joint Appendix** upon the attorney**s** named below, by depositing **one copy on Mrs. Eva Datz two**~~ee~~ cop**ies** thereof, **on John T. Elfvin & Richard J. Kippes** properly enclosed in a sealed, postpaid wrapper, in the letter box of the Capitol Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Post Office Department, directed to the said attorney**s** at the address **es** within the State respectively theretofore designated by **them** for that purpose as follows:

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Sworn to before me this
7th day of **August** 197**4**

Nicholas L. Sullivan

NICHOLAS L. SULLIVAN
Notary Public, State of New York
No. 55-9246325
Qualified in Albany County
Term Expires March 30, 19**7**~~5~~.